

# CASES AND MATERIALS ON CONSTITUTIONAL LAW

By

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(Illustrative Cases on Constitutional Law)

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## PREFACE

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THE last decade and a half has been a period of extensive changes in the Constitution of the United States. These have not been wrought through resort to the formal process of amendment under Article V. They have been the product of the courts' response to old and new problems by reference to political, social and economic philosophies that involved important shifts in emphasis from those that had contributed to shape the judicial construction of the Constitution that prevailed during the first three decades of the twentieth century. The reinterpretation of the Constitution from the point of view of these new philosophies is still in process. It has, however, proceeded far enough to reveal the major trends that are likely to prevail for some time to come. This is a factor that has to be taken into account in selecting the case material to be used in presenting the subject of Constitutional Law at the present time. However, it is impossible to ignore those areas of Constitutional Law which have remained relatively unaffected by the marked developments since the 1930's.

The present Casebook has been compiled on the assumption that it is desirable to provide the instructor with a working tool that will enable him to acquaint the student with the major problems that have arisen in the course of interpreting the Federal Constitution. These include some that are common to it and the state Constitutions, such as the entire theory of judicial review and the separation of powers. The cases dealing with these are presented first. These are followed by materials presenting the major problems that have arisen under the Federal Constitution. These are grouped under four principal headings as follows: (1) The position of the federal government and the interrelations between it and the states; (2) The position of the states and their interrelations; (3) The powers of the federal government; and (4) The limitations imposed by the Federal Constitution upon both the federal government and the states.

The general aspects of the first of those problems can be effectively presented by the cases involving the implied immunities of each government from undue interference by the other. This is the subject-matter of Chapter 4. The second problem is largely concerned with Article 4 of the Constitution. These form the subject matter of Chapter 5. The next eight chapters are de-

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voted to the treatment of the scope of the powers conferred upon the federal government, and the effect of their grant or exercise upon the scope of state powers. The emphasis has been upon the commerce and fiscal powers, although all the more important of them have been covered by one or more cases. Since the law concerning the relation between federal and state powers has been largely developed in connection with the commerce power, this has been separately treated in Chapter 9. The remaining eight chapters are devoted to the limitations imposed on both the federal government and the states by various provisions of the Federal Constitution. These limitations restrict both the substantive law and the procedures by which government can enforce its laws. Six chapters are devoted to the former type of problem, and two to procedural limitations. The grouping of the materials dealing with the former has been on the basis of the kind of interest involved. The economic interests may be affected by regulatory legislation, and by exercises of the power of taxation and that of eminent domain. This furnished the basis for grouping together the chapters dealing with the restrictions on government regulation of economic activities resulting from due process clauses and the contract clause, the limitations on the taxing power, and the limitations on exercises of the power of eminent domain. This group is followed by a chapter devoted to the protection accorded civil and political rights by the Federal Bill of Rights and the other provisions of the Federal Constitution directed at that objective. The last two chapters deal respectively with the constitutional limitations on the enforcement of criminal laws, and upon civil and administrative proceedings. In these chapters it is the character of the sanction invoked, rather than the conceptual terms in which the constitutional limitations are phrased, that furnished the basis for the grouping of the materials.

Equally important as the order of presentation is the method of development of the chapter topics. The aim has been to present as many as possible of the types of problem that have appeared in each field. An example will clarify this. Chapter 9 deals with the effect of the commerce clause upon the powers of the state. The decisions on this generally have involved either the state's police power or its taxing power. In the case of the latter, decisions have been made involving a wide variety of taxes. The judicial analysis and reasoning has often varied with the character of the tax before the court. Hence, cases have been presented discussing practically every kind of state tax on whose validity under the commerce clause the courts have passed. The

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result is a wider knowledge of the general problem than can be gleaned from discussing a series of cases dealing with a single type of state tax. The latter aspect has been taken care of by note material consisting of brief statements of cases in a series other than that selected for the text material. Notes have been used copiously not only for that purpose, but also to trace the historical development of a doctrine where that was deemed important.

The principles on which the cases printed in the casebook have been selected may be briefly noted. There are certain historical cases with which a lawyer should be familiar. These have been used at appropriate points. However, it has been recognized that important developments have occurred in Constitutional Law during the past fifteen years. It is in these that are to be found the trends that define the probable course of future developments. The important decisions marking this trend have accordingly been selected. Here too notes have been used to complement the selected cases. The notes have also been used to call attention to the periodical literature on all the important subjects dealt with in the casebook.

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# CASES

ON

## CONSTITUTIONAL LAW

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### CHAPTER 1

#### LEGAL CHARACTER AND FUNCTION OF CONSTITUTIONS

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#### VAN HORNE'S LESSEE v. DORRANCE.

Circuit Court of the United States, Pennsylvania District, 1795. 2 Dall. 304,  
1 L.Ed. 391.

[The following excerpt is taken from the instructions to the jury in a proceeding for the recovery of land brought in the Circuit Court for the District of Pennsylvania. The Presiding Justice directed a verdict for the plaintiff.]

PATTERSON, J. \* \* \* This [certain legislation of Pennsylvania confirming titles to specified lands] is the keystone to defendant's title, as one of his counsel very properly expressed it. \* \* \* To aid you, gentlemen, in forming a verdict, I shall consider: I. The constitutionality of the confirming act; or, in other words, whether the legislature had authority to make that act?

Legislation is the exercise of sovereign authority. High and important powers are necessarily vested in the Legislative body; whose acts, under some forms of government, are irresistible and subject to no control. In England, from whence most of our legal principles and legislative notions are derived, the authority of the Parliament is transcendent, and has no bounds. "The Power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute that it cannot be confined, either

for causes or persons, within any bounds. \* \* \* It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that when the parliament doth, no authority upon earth can undo." (1 Bl. Com. 160.)

From this passage it is evident, that, in England, the authority of parliament runs without limits, and rises above control. It is difficult to say what the constitution of England is; because, not being reduced to written certainty and precision, it lies entirely at the mercy of the parliament. It bends to every governmental exigency; it varies and is blown about by every breeze of legislative humor or political caprice. Some of the judges in England, have had the boldness to assert; that an act of parliament, made against natural equity, is void; but this position contravenes the general position, that the validity of an act of parliament cannot be drawn in question by the judicial department. It cannot be disputed, and must be obeyed. The power of parliament is absolute and transcendant; it is omnipotent in the scale of political existence. Besides, in England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different. Every state in the union has its constitution reduced to written exactitude and precision.

What is a constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it.

The life-giving principle and death-doing stroke must proceed from the same hand. What are legislatures? Creatures of the constitution; they owe their existence to the constitution; they derive their powers from the constitution. It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The constitution is the work or will of the people themselves, in their original, sovereign and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve. Whatever

may be the case in other countries, yet in this, there can be no doubt, that every act of the legislature, repugnant to the constitution is absolutely void.

[The Justice thereupon held the Pennsylvania statute violative of the state constitution, and directed a verdict for the plaintiff.]

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### MARTIN v. HUNTER'S LESSEE.

Supreme Court of the United States, 1816. 1 Wheat. 304, 4 L.Ed. 97.

[In this case the Court sustained the provisions of Section 25 of the Judiciary Act of 1789 [28 U.S.C.A. § 344 note] so far as that provided for the review by the Supreme Court of the United States of the judgments of state courts in suits in which was drawn in question the validity of a treaty, or a statute of, or an authority exercised under, the United States, if the decision had been against their validity. The following excerpt is from the opinion of Mr. Justice Story.]

STORY, J. \* \* \* Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar.

The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by "the people of the United States". There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might choose not to delegate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the constitution [U.S.C.A.Const. Amend. 10], which declares, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers, as its own wisdom and the public interest should require. \* \* \*

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### DODGE v. WOOLSEY.

Supreme Court of the United States, 1855. 18 How. 331, 15 L.Ed. 401.

[Suit by a stockholder of a state bank to enjoin the collection of a tax imposed upon the bank by the legislature of Ohio. The Court held the legislation imposing the tax violative of the con-

tract clause of the federal Constitution, and affirmed the decision of the lower court in granting the injunction.]

WAYNE, J. \* \* \* Impelled, then, by a sense of duty to the Constitution, and the administration of so much of it as has been assigned to the judiciary, we proceed with the discussion.

The Departments of the government are Legislative, Executive and Judicial. They are co-ordinate in degree to the extent of the powers delegated to each of them. Each, in the exercise of its powers, is independent of the other, but all, rightfully done by either, is binding upon the others. The Constitution is supreme over all of them, because the people who ratified it have made it so; consequently, anything which may be done unauthorized by it is unlawful. But it is not only over the departments of the government that the Constitution is supreme. It is so, to the extent of its delegated powers, over all who made themselves parties to it; states as well as persons, within those concessions of sovereign powers yielded by the people of the states, when they accepted the Constitution in their conventions. Nor does its supremacy end there. It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the Congress of the United States, when two thirds of both houses shall propose them; or where the Legislatures of two thirds of the several states shall call a convention for proposing amendments, which in either case become valid, to all intents and purposes, as a part of the Constitution, when ratified by the Legislatures of three fourths of the several states, or by conventions in three fourths of them, as one or the other mode of ratification may be proposed by Congress. \* \* \*

\* \* \* The States, or rather the peoples forming it, though sovereign as to the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are not independent of each other in respect to the powers ceded in the Constitution.

Their union, by the Constitution, was made by each of them conceding portions of their equal sovereignties for all of them, and it acts upon the states conjunctively and separately, and in the same manner upon their citizens, aggregately in some things, and in others individually, in many of their relations of business, and also upon their civil conduct, so far as their obedience to the laws of Congress is concerned. \* \* \*

## LANE COUNTY v. OREGON.

Supreme Court of the United States, 1869. 7 Wall. 71, 19 L.Ed. 101.

[The Court in this case held that the provisions of federal statutes making United States notes a legal tender for debts did not include taxes due under state statutes among such debts. The excerpt below is from the opinion of Mr. Chief Justice Chase.]

CHASE, C. J. \* \* \* We proceed, then, to inquire whether, upon a sound construction of the Acts, taxes imposed by a state government upon the people of the state, are debts within their true meaning.

In examining this question it will be proper to give some attention to the Constitution of the States and to their relations as United States.

The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each state compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States.

Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a National Government, acting, with ample power, directly upon the citizens, instead of a Confederate Government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the National Government are reserved. The general condition was well expressed by Mr. Madison in the *Federalist*, thus: "The Federal and State Governments are, in fact, but different agents and trustees of the people, constituted with different powers and designated for different purposes." \* \* \*

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STATE ex rel. ATTORNEY GENERAL v. STATE BOARD  
OF EQUALIZATION.

Supreme Court of Montana, 1919. 56 Mont. 413, 185 P. 708.

PER CURIAM. This is an original application for mandamus, on the relation of the Attorney General, to compel the State

Board of Equalization to make certain assessments, in accordance with the provisions of section 1, c. 48, and section 6, c. 49, Laws of the Sixteenth Legislative Assembly. \* \* \*

The provision of section 16, art. 12, of the Constitution, that "all property shall be assessed in the manner prescribed by law except as is otherwise provided in this Constitution," is clear and explicit in vesting in the Legislature plenary power in matters of assessment, including the power to designate the agency through which the assessment shall be made. Speaking with reference to this provision, in the case of *Missouri River Power Co. v. Steele*, 32 Mont. 433, 80 P. 1093, this court said:

"We might be somewhat confused as to the meaning of the phrase 'in the manner prescribed by law,' except for the interpretation placed thereon by the same section. By the first sentence of this section the Legislature is left free to prescribe the manner in which property shall be assessed, except so far as the Constitution has prescribed such manner. And what is the exception? That 'the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the State Board of Equalization.' The manner, then, includes the agency which shall make the assessment; for the above excepting clause has no reference to the last portion of the section, which only refers to the division or apportionment of the assessment after the same is made, and can only refer to the agency employed, which in that clause is the State Board of Equalization."

In that case the court had under consideration the constitutionality of a statute which provided for the appointment, in certain counties, of boards of appraisers whose duty it was to fix the valuation of real estate for the purpose of assessment by the county assessor; and what is there said is applicable here, unless by some other provision of the Constitution the authority of the Legislature to confer upon the State Board of Equalization the power to make an original assessment of property, other than railroad property, is denied.

It is argued by counsel for respondents that the authority conferred upon the State Board of Equalization to assess the property of railroads excludes all other powers of original assessment, because the provisions of the Constitution are mandatory and prohibitory (section 29, art. 3); that the maxim, *Expressio unius est exclusio alterius*, applies; and that the omission from section 15, art. 12 of the Constitution, as amended in 1916 (see Laws 1917, c. 174), which defines the duties of the state and county boards of equalization, of the provision which was a part of said section before it was amended, that the boards shall "also perform such other duties as may be prescribed by law," evinces

a clear intention to restrict the duties of the State Board of Equalization to those specified in the section itself, with the exception only of the assessment of the property of railroads. Such an omission would have great force if we were considering its effect in connection with a statute amended by the Legislature.

However, the Constitution is not a grant, but a limitation, of the powers of the Legislature. This fundamental distinction between the Constitution of a state and the Constitution of the United States has frequently been stated by this court. In the case of *State ex rel. Sam Toi v. French*, 17 Mont. 54, 41 P. 1078, 30 L.R.A. 415, it was said:

"A state Legislature is not acting under enumerated or granted powers, but rather under inherent powers, restricted only by the provisions of their sovereign Constitution."

And in the case of *Missouri River Power Co. v. Steele*, above, this court said:

"In the matter of legislation, the people, through the Legislature, have plenary power, except in so far as inhibited by the Constitution, and the person who denies the authority in any given instance must be able to point out distinctly the particular provision of the Constitution which limits or prohibits the power exercised."

See, also, *Hilger v. Moore*, 56 Mont. 146, 182 P. 477, and *In re Pomeroy*, 51 Mont. 119, 151 P. 333.

In determining, therefore, the effect of this omission from section 15, it is to be borne in mind that the inquiry is not whether the power for a particular enactment is to be found in express terms in the Constitution, but whether there is anything in that instrument which forbids the legislation. Viewed in this light, we do not find, in the omission of the sentence above quoted, any inhibition of the exercise by the Legislature of the power under consideration.

The authority contained in the first sentence of section 16 is also not in any wise abridged by the remainder of the section, which empowers the board to assess railroad property. The provisions of that section are mandatory and prohibitory, in the sense that the Legislature cannot take from the State Board of Equalization the power to assess railroad property nor vest such power elsewhere.

The maxim, *Expressio unius est exclusio alterius*, invoked by respondents, is a rule of interpretation, and not a constitutional command, and cannot be made to serve as a means to restrict the plenary power of the Legislature, nor to control an express provision of the Constitution. \* \* \*

The motion to quash the alternative writ, and to dismiss this proceeding, is therefore overruled, and the respondents may an-

swer within 10 days, if they so elect. Otherwise, a peremptory writ of mandate will issue.

### NOTE

The theory that a state constitution is not grant of, but a limitation upon, the powers of a state legislature is incorrect. It is apparently based on the fact that a state constitution seldom expressly grants the state's legislative power upon the legislative body established by it, while the limitations upon the exercise of state governmental powers are set forth in express terms. In truth, a state constitution is both a grant of powers to the several departments of government established by it, and a limitation upon the exercise of those powers. The courts have emphasized the latter aspect, but have implicitly assumed that a state constitution was intended by the people of the state to confer upon the several departments the full extent of governmental powers possessed by the people under the Constitution of the United States. See W. F. Dodd, *The Function of a State Constitution*, 30 *Pol. Science Quar.* 201 (1915).

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### MARBURY v. MADISON.

Supreme Court of United States, 1803. 1 Cranch 137, 2 L.Ed. 60.

[Original mandamus proceeding. William Marbury and others moved for a rule to James Madison, Secretary of State, to show cause why a mandamus should not issue commanding the delivery to applicants of their commissions as justices of the peace of the District of Columbia, which had been previously signed by President Adams just before the expiration of his term of office. The Judiciary Act of 1789 authorized the Supreme Court "to issue writs of mandamus \* \* \* to any courts appointed or persons holding office under the authority of the United States," 28 U.S.C.A. § 342. After deciding that the applicants had a legal right to the commissions, that mandamus was a proper remedy, but that the power to issue it was not within the original jurisdiction of the Supreme Court, under article 3, § 2, par. 2, of the Constitution, U.S.C.A. Const. Art. 3, § 2, par. 2, the court proceeded as follows:]

Mr. Chief Justice MARSHALL. \* \* \* The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting

to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of

this subject. If an act of the legislature repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written Constitution, would of itself be sufficient, in America, where written Constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those

who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject. It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the Constitution, and only see the law? The Constitution declares "that no bill of attainder or ex post facto law shall be passed." If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve? "No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as ———, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States." Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government—if it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is

worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank. Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.

Rule discharged.

### NOTE

1. See for general discussion the following: E. S. Corwin, *The Establishment of Judicial Review*, 9 Mich.L.Rev. 102, 283 (1910, 1911); E. S. Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 Mich.L.Rev. 538 (1914); J. B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L.Rev. 129 (1893); C. G. Haines, *Judicial Review of Legislation in the United States*, 2 Tex.L.Rev. 257, 387 (1924); 3 Ibid. 1 (1924); E. S. Corwin, *Judicial Review in Action*, 74 U.Pa.L.Rev. 639 (1926).

2. The practice of judicial review also prevails in the several states. As an incident of our federal system there are three forms in which the issue of the constitutionality of legislation presents itself: (1) the constitutionality of an Act of Congress under the provisions of the Constitution of the United States; (2) the constitutionality of state legislation under the provisions of that Constitution; and (3) the constitutionality of state legislation under the provisions of the state constitution. Federal courts will decide issues of state constitutional law, and state courts those of federal constitutional law, if, in either case, it is necessary to decide a case before them; see *Martin v. Hunter's Lessee*, 1 Wheat. 304, 4 L.Ed. 97 (1816). However, state courts are bound by the decisions of federal courts on matters of federal constitutional law, and federal courts are bound by the decisions of a state court on matters of that state's constitutional law; see *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255 (1923).

3. The practice of judicial review has at times provoked considerable criticisms. These have at times produced proposals for constitutional amendments to curb its exercise. No provision of the federal Constitution prevents a state from limiting the power of its courts to determine the validity of its legislation under the state constitution; *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74, 50 S.Ct. 228, 74 L.Ed. 710, 66 A.L.R. 1460 (1930). A state's power to limit its courts in invalidating state legislation for conflict with provisions of the federal Constitution has been held subject to limitations found in that Constitution; *People v. Western Union Tel. Co.*, 70 Colo. 90, 198 P. 146, 15 A.L.R.

326 (1921); *People v. Max*, 70 Colo. 100, 198 P. 150 (1921). See K. B. Fite and L. B. Rubinstein, *Curbing the Supreme Court*, 35 Mich.L.Rev. 762 (1937); M. S. Culp, *A Survey of Proposals to Limit or Deny the Power of Judicial Review by the Supreme Court of the United States*, 4 Ind.L.Jour. 386, 474 (1929).

4. Courts have also exercised the power to invalidate acts of the executive department; see *Rathbun v. U. S.*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935).

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UNITED STATES v. BUTLER, 1936, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914. [The Court in this case held invalid a purported exercise of the federal taxing power on the ground that the expenditure of the tax revenues so derived constituted an indirect attempt to regulate agricultural production which was deemed a matter lying within the exclusive power of the separate states. The excerpt is from the dissenting opinion of Mr. Justice STONE.]

The present stress of widely held and strongly expressed differences of opinion of the wisdom of the Agricultural Adjustment Act makes it important, in the interest of clear thinking and sound result, to emphasize at the outset certain propositions which should have controlling influence in determining the validity of the Act. They are:

1. The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government. \* \* \*

A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending, which might occur if courts could not prevent expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility. Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of

their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction, is far more likely, in the long run, "to obliterate the constituent members" of "an indestructible union of indestructible states" than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nation-wide economic maladjustment by conditional gifts of money.

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BORGNIS v. FALK CO., 1911, 147 Wis. 327, 348-350, 133 N.W. 209, 215, 216, 37 L.R.A.,N.S., 489, WINSLOW, C. J. [upholding a Wisconsin workmen's compensation act upon an "elective" insurance plan]:

"In approaching the consideration of the present law, we must bear in mind the well-established principle that it must be sustained, unless it be clear beyond reasonable question that it violates some constitutional limitation or prohibition. That governments founded on written Constitutions which are made difficult of amendment or change lose much in flexibility and adaptability to changed conditions there can be no doubt. Indeed that may be said to be one purpose of the written Constitution. Doubtless they gain enough in stability and freedom from mere whimsical and sudden changes to more than make up for the loss in flexibility; but the loss still remains, whether for good or ill. A Constitution is a very human document, and must embody with greater or less fidelity the spirit of the time of its adoption. It will be framed to meet the problems and difficulties which face the men who make it, and it will generally crystallize with more or less fidelity the political, social, and economic propositions which are considered irrefutable, if not actually inspired, by the philosophers and legislators of the time; but the difficulty is that, while the Constitution is fixed or very hard to change, the conditions and problems surrounding the people, as well as their ideals, are constantly changing. The political or philosophical aphorism of one generation is doubted by the next, and entirely discarded by the third. The race moves forward constantly, and no Canute can stay its progress.

"Constitutional commands and prohibitions, either distinctly laid down in express words or necessarily implied from general words, must be obeyed, and implicitly obeyed, so long as they remain unamended or unrepealed. Any other course on the part of either legislator or judge constitutes violation of his oath

of office; but when there is no such express command or prohibition, but only general language, or a general policy drawn from the four corners of the instrument, what shall be said about this? By what standards is this general language or general policy to be interpreted and applied to present day people and conditions? When an eighteenth century Constitution forms the charter of liberty of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes.

"Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation. These general propositions are here laid down, not because they are considered either new or in serious controversy, but because they are believed to be peculiarly applicable to a case like the present, where a law which is framed to meet new economic conditions and difficulties resulting therefrom is attacked principally because it is believed to offend against constitutional guaranties or prohibitions couched in general terms, or supposed general policies drawn from the whole body of the instrument."

### NOTE

1. The Supreme Court today gives less effect to the presumption of constitutionality "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth" Amendment, than when legislation merely regulates economic activities; see *U. S. v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), footnote 4. See Note, *The Presumption of Constitutionality*, 31 Col.L. Rev. 1136 (1931).

2. Mr. Justice Brandeis has suggested that there is a distinction between right to liberty of person and other constitutional rights when the issue is the extent of judicial review of the findings of fact of administrative boards; *St. Joseph Stock Yards Co. v. U. S.*, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033 (1936), at p. 77 of 298 U.S., p. 737 of 56 S.Ct.

3. For discussion of use of extrinsic aids in constitutional construction, see H. W. Bikle: *Judicial Determination of Questions of*

Fact Affecting the Constitutional Validity of Legislative Action, 38 Harv.L.Rev. 6 (1924); J. Ten Broeck, Admission and Use by United States Supreme Court of Extrinsic Aids in Constitutional Construction, 26 Calif.L.Rev. 287, 437, 664 (1938-39), 27 Ibid. 157, 399 (1939).

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### WEST COAST HOTEL CO. v. PARRISH.

Supreme Court of the United States, 1936. 300 U.S. 379, 57 S.Ct. 578,  
81 L.Ed. 703, 108 A.L.R. 1330.

[Sustaining a state minimum wage law for women employed in specified businesses and industries. The following excerpt is from the dissenting opinion of Mr. Justice SUTHERLAND.]

Mr. Justice SUTHERLAND.

Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, Mr. Justice BUTLER, and I think the judgment of the court below should be reversed.

The principles and authorities relied upon to sustain the judgment were considered in *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238, and *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 56 S.Ct. 918, 80 L.Ed. 1347, 103 A.L.R. 1445, and their lack of application to cases like the one in hand was pointed out. A sufficient answer to all that is now said will be found in the opinions of the court in those cases. Nevertheless, in the circumstances, it seems well to restate our reasons and conclusions.

Under our form of government, where the written Constitution, by its own terms, is the supreme law, some agency, of necessity, must have the power to say the final word as to the validity of a statute assailed as unconstitutional. The Constitution makes it clear that the power has been intrusted to this court when the question arises in a controversy within its jurisdiction; and so long as the power remains there, its exercise cannot be avoided without betrayal of the trust.

It has been pointed out many times, as in the *Adkins Case*, that this judicial duty is one of gravity and delicacy; and that rational doubts must be resolved in favor of the constitutionality of the statute. But whose doubts, and by whom resolved? Undoubtedly it is the duty of a member of the court, in the process of reaching a right conclusion, to give due weight to the opposing views of his associates; but in the end, the question which he must answer is not whether such views seem sound to those who entertain them, but whether they convince him that the statute is constitutional or engender in his mind a rational doubt upon that issue. The oath which he takes as a judge is not a

composite oath, but an individual one. And in passing upon the validity of a statute, he discharges a duty imposed upon him, which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so important he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence.

The suggestion that the only check upon the exercise of the judicial power, when properly invoked, to declare a constitutional right superior to an unconstitutional statute is the judge's own faculty of self-restraint, is both ill considered and mischievous. Self-restraint belongs in the domain of will and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution, and by his own conscientious and informed convictions; and since he has the duty to make up his own mind and adjudge accordingly, it is hard to see how there could be any other restraint. This Court acts as a unit. It cannot act in any other way; and the majority (whether a bare majority or a majority of all but one of its members), therefore, establishes the controlling rule as the decision of the court, binding, so long as it remains unchanged, equally upon those who disagree and upon those who subscribe to it. Otherwise, orderly administration of justice would cease. But it is the right of those in the minority to disagree, and sometimes, in matters of grave importance, their imperative duty to voice their disagreement at such length as the occasion demands—always, of course, in terms which, however forceful, do not offend the proprieties or impugn the good faith of those who think otherwise.

It is urged that the question involved should now receive fresh consideration, among other reasons, because of "the economic conditions which have supervened"; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.

The words of Judge Campbell in *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 139, 140, apply with peculiar force. "But it may easily happen," he said, "that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions can not be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things. \* \* \*

"Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances. \* \* \* But, where evils arise from the application of such regulations, their force cannot be denied or evaded; and the remedy consists in repeal or amendment, and not in false construction." The principle is reflected in many decisions of this Court. \* \* \*

The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase "supreme law of the land" stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections.

If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation—and the only true remedy—is to amend the Constitution. Judge Cooley, in the first volume of his *Constitutional Limitations* (8th Ed.) p. 124, very clearly pointed out that much of the benefit expected from written Constitutions would be lost if their provisions were to be bent to circumstances or modified by public opinion. He pointed out that the common law, unlike a Constitution, was subject to modification by public sentiment and action which the courts might recognize; but that "a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. \* \* \* What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is

adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."

The Adkins Case dealt with an Act of Congress which had passed the scrutiny both of the legislative and executive branches of the government. We recognized that thereby these departments had affirmed the validity of the statute, and properly declared that their determination must be given great weight, but we then concluded, after thorough consideration, that their view could not be sustained. We think it not inappropriate now to add a word on that subject before coming to the question immediately under review.

The people by their Constitution created three separate, distinct, independent, and coequal departments of government. The governmental structure rests, and was intended to rest, not upon any one or upon any two, but upon all three of these fundamental pillars. It seems unnecessary to repeat, what so often has been said, that the powers of these departments are different and are to be exercised independently. The differences clearly and definitely appear in the Constitution. Each of the departments is an agent of its creator; and one department is not and cannot be the agent of another. Each is answerable to its creator for what it does, and not to another agent. The view, therefore, of the Executive and of Congress that an act is constitutional is persuasive in a high degree; but it is not controlling.

Coming, then, to a consideration of the Washington statute, it first is to be observed that it is in every substantial respect identical with the statute involved in the Adkins Case. Such vices as existed in the latter are present in the former. And if the Adkins Case was properly decided, as we who join in this opinion think it was, it necessarily follows that the Washington statute is invalid.

#### NOTE

1. In a concurring opinion in *St. Joseph Stock Yards Co. v. U. S.*, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033 (1936), Messrs. Justices Stone and Cardozo said, "We think the opinion of Mr. Justice Brandeis states the law as it ought to be, though we appreciate the weight of precedent that has now accumulated against it. If the opinion of the Court did no more than accept those precedents and follow them, we might be moved to acquiescence. More, however, has been attempted. The opinion re-examines the foundations of the rule that it declares, and finds them to be firm and true. We will not go so far. The doctrine of *stare decisis*, however appropriate and even necessary at times, has only a limited application in the field of constitutional law. See the cases collected by Brandeis, J., dissenting, in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407, 408, 52 S.Ct. 443, 76 L.Ed. 815. If the challenged doctrine is to be reconsidered, we are unwilling to approve it."

2. See L. B. Boudin, *The Problem of Stare Decisis in Our Constitutional Theory*, 8 N.Y.U.L.Quar.Rev. 589 (1931).

## CHAPTER 2

# THEORY AND PRACTICE OF JUDICIAL REVIEW

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### MASSACHUSETTS v. MELLON.

Supreme Court of the United States, 1923. 262 U.S. 447, 43 S.Ct. 597,  
67 L.Ed. 1078.

[Appeal from the Court of Appeals of the District of Columbia, in a suit brought by a taxpayer of the State of Massachusetts against the Secretary of the Treasury and others. Also an original suit in the Supreme Court of the United States by the Commonwealth of Massachusetts against the same defendants. Both cases challenged the constitutionality of the Act of Congress of November 23, 1921, 42 Stat. 224, commonly called the "Maternity Act," and sought to prevent the federal officers made defendants from putting it into effect. The cases were argued, considered, and disposed of together. The original suit was dismissed, and the decree in the other suit affirmed.]

Mr. Justice SUTHERLAND. \* \* \* The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws, to the executive the duty of executing them, and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. *Gaines v. Thompson*, 7 Wall. 347, 19 L.Ed. 62. We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show, not only that the statute is invalid, but

that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess.

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### FAIRCHILD v. HUGHES.

Supreme Court of the United States, 1922. 258 U.S. 126, 42 S.Ct. 274,  
66 L.Ed. 499.

Mr. Justice BRANDEIS delivered the opinion of the Court.

On July 7, 1920, Charles S. Fairchild, of New York, brought this suit in the Supreme Court of the District of Columbia against the Secretary of State and the Attorney General. The prayers of the bill are that "the so-called Suffrage Amendment [the Nineteenth to the federal Constitution] be declared unconstitutional and void"; that the Secretary of State be restrained from issuing any proclamation declaring that it has been ratified; and that the Attorney General be restrained from enforcing it. There is also a prayer for general relief and for an interlocutory injunction. The plaintiff, and others on whose behalf he sues, are citizens of the United States, taxpayers and members of the American Constitutional League, a voluntary association which describes itself as engaged in diffusing "knowledge as to the fundamental principles of the American Constitution, and especially that which gives to each state the right to determine for itself the question as to who should exercise the elective franchise therein."

The claim to relief was rested upon the following allegations: The Legislatures of 34 of the states have passed resolutions purporting to ratify the Suffrage Amendment; and from one other state the Secretary of State of the United States has received a certificate to that effect purporting to come from the proper officer. The proposed amendment cannot, for reasons stated, be made a part of the Constitution through ratification by the

Legislatures, and there are also specific reasons why the resolutions already adopted in several of the states are inoperative. But the Secretary has declared that he is without power to examine into the validity of alleged acts of ratification, and that, upon receiving from one additional state the customary certificate, he will issue a proclamation declaring that the Suffrage Amendment has been adopted. Furthermore, "a force bill" has been introduced in the Senate, which provides fine and imprisonment for any person who refuses to allow women to vote, and, if the bill is enacted, the Attorney General will be required to enforce its provisions. The threatened proclamation of the adoption of the amendment would not be conclusive of its validity, but it would lead election officers to permit women to vote in states whose Constitutions limit suffrage to men. This would prevent ascertainment of the wishes of the legally qualified voters, and elections, state and federal, would be void. Free citizens would be deprived of their right to have such elections duly held, the effectiveness of their votes would be diminished, and election expenses would be nearly doubled. Thus irremediable mischief would result.

The Supreme Court of the District granted a rule to show cause why an interlocutory injunction should not issue. The return was promptly made, and the defendants also moved to dismiss the bill. On July 14, 1920, the rule was discharged, a decree was entered dismissing the bill, and an appeal was taken to the Court of Appeals of the District. The Secretary, having soon thereafter received a certificate of ratification from the thirty-sixth state, proclaimed, on August 26, 1920, the adoption of the Nineteenth Amendment. The defendants then moved to dismiss or affirm. The Court of Appeals affirmed the decree, on the authority of *United States v. Colby*, 49 App.D.C. 358, 265 F. 998, where it had refused to compel the Secretary to cancel the proclamation declaring that the Eighteenth Amendment had been adopted. The grounds of that decision were that the validity of the amendment could be in no way affected by an order of cancellation; that it depended on the ratifications by the states, and not on the proclamation; and that the proclamation was unimpeachable, since the Secretary was required, under Revised Statutes, § 205 [5 U.S.C.A. § 160], to issue the proclamation upon receiving from three-fourths of the states official notice of ratification, and had no power to determine whether or not the notices received stated the truth. But we have no occasion to consider these grounds of decision.

Plaintiff's alleged interest in the question submitted is not such as to afford a basis for this proceeding. It is frankly a proceeding to have the Nineteenth Amendment declared void. In

form it is a bill in equity; but it is not a case, within the meaning of section 2 of article 3 of the Constitution, which confers judicial power on the federal courts, for no claim of plaintiff is "brought before the court[s] for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." See *In re Pacific Railway Commission*, C.C., 32 F. 241, 255, quoted in *Muskrat v. United States*, 219 U.S. 346, 357, 31 S.Ct. 250, 55 L.Ed. 246. The alleged wrongful act of the Secretary of State, said to be threatening, is the issuing of a proclamation which plaintiff asserts will be vain, but will mislead election officers. The alleged wrongful act of the Attorney General, said to be threatening, is the enforcement, as against election officers, of the penalties to be imposed by a contemplated act of Congress which plaintiff asserts would be unconstitutional. But plaintiff is not an election officer; and the state of New York, of which he is a citizen, had previously amended its own Constitution so as to grant the suffrage to women, and had ratified this amendment. Plaintiff has only the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute, if passed, or a constitutional amendment, about to be adopted, will be valid. Compare *Giles v. Harris*, 189 U.S. 475, 23 S.Ct. 639, 47 L.Ed. 909; *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 21 S.Ct. 206, 45 L.Ed. 252.

Decree affirmed.

### NOTE

1. The existence of a case depends in part on the character of the interest for whose protection the litigant invokes judicial aid. The law as to what interests suffice for that purpose is in a very confused condition. Thus the interest of a state in preventing a use of the federal taxing power to eliminate a tax advantage conferred by its laws is insufficient. *Florida v. Mellon*, 273 U.S. 12, 47 S.Ct. 265, 71 L.Ed. 511 (1927); but its interest on behalf of its citizens affected by federal or state legislation is sometimes deemed sufficient, *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 56 S.Ct. 235, 80 L.Ed. 251, 100 A.L.R. 1403 (1935), and sometimes not, *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117, 32 A.L.R. 300 (1923). Its proprietary interests, and its quasi-sovereign right to regulate wild game within its borders, have been held sufficient, *Pennsylvania v. West Virginia*, *supra*; *Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641, 11 A.L.R. 984 (1920). Cf. with *Mass v. Mellon*, the case of *U. S. v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914 (1936). For an interesting

decision as to when the interest of state legislators in an act of the legislature constitutes sufficient interest, see *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385, 122 A.L.R. 695 (1939).

2. For discussion of the interest required where the issue is brought before the court in declaratory judgment proceedings, see *Oklahoma v. U. S. Civil Service Commission*, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947), and *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

3. That the courts will not decide constitutional issues in collusive suits, see *U. S. v. Johnson*, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943).

4. Such issues are frequently decided in shareholders' suits against their corporation to enjoin its compliance with legislation affecting it directly; *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936).

5. There are situations in which a person may be denied the right to raise a constitutional issue even though a case or controversy exists; see *Smith v. Indiana*, 191 U.S. 138, 24 S.Ct. 51, 48 L.Ed. 125 (1903); *Braxton County Court v. West Virginia*, 208 U.S. 192, 28 S.Ct. 275, 52 L.Ed. 450 (1908); *Fahey v. Mallonee*, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947); and the concurring opinion of Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, *supra*.

6. For discussion of considerations inducing the Supreme Court of the United States to deny review in cases coming up from state courts, see *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945); *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947); *Gospel Army v. Los Angeles*, 331 U.S. 543, 67 S.Ct. 1428, 91 L.Ed. 1662 (1947).

7. See generally, M. S. Culp, *Methods of Attacking Unconstitutional legislation*, 22 Va.L.Rev. 723 (1936); Note, *The Power of a State Officer to Raise a Constitutional Question*, 33 Col.L.Rev. 1036 (1933); Lockwood, *Law and Rosenberry*, *The Use of the Federal Injunction in Constitutional Litigation*, 43 Harv.L.Rev. 426 (1930); Note, *Estoppel to Attack the Constitutionality of a Statute*, 34 Col.L.Rev. 1495 (1934).

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### NORTON v. SHELBY COUNTY.

Supreme Court of United States, 1886. 118 U.S. 425, 6 S.Ct. 1121,  
30 L.Ed. 178.

[Error to the Circuit Court of the United States for the Western District of Tennessee. A state statute purported to create a board of county commissioners for the government of Shelby county, in place of the existing county court. Within a month thereafter an action was brought against this board to test the validity of its creation, and the lower state court upheld it. Pend-

ing an appeal to the state Supreme Court, said board issued certain bonds authorized by the statute creating it. On the appeal the state Supreme Court held this statute unconstitutional and the board created thereby to be without lawful authority. Suit being brought by Norton thereafter upon some of said bonds in the federal Circuit Court, judgment was given for defendant county.]

Mr. Justice FIELD. \* \* \* But it is contended that if the act creating the board was void, and the commissioners were not officers de jure, they were nevertheless officers de facto, and that the acts of the board as a de facto court are binding upon the county. This contention is met by the fact that there can be no officer, either de jure or de facto, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, nor did the supreme court of the state. Whenever such pretensions were considered in that court, they were declared to be without any legal foundation, and the commissioners were held to be usurpers. The doctrine which gives validity to acts of officers de facto, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until, in some regular mode prescribed by law, their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet

it by any argument beyond this statement: An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

In *Hildreth v. McIntire*, 1 J. J. Marsh, Ky., 206, 19 Am. Dec. 61, we have a decision from the court of appeals of Kentucky which well illustrates this doctrine. The legislature of that state attempted to abolish the court of appeals established by her Constitution, and create in its stead a new court. Members of the new court were appointed, and undertook to exercise judicial functions. They dismissed an appeal because the record was not filed with the person acting as their clerk. A certificate of the dismissal signed by him was received by the lower court, and entered of record, and execution to carry into effect the original decree was ordered to issue. To reverse this order an appeal was taken to the constitutional court of appeals. The question was whether the court below erred in obeying the mandate of the members of the new court, and its solution depended upon another, whether they were judges of the court of appeals, and the person acting as their clerk was its clerk. The court said: "Although they assumed the functions of judges and clerk, and attempted to act as such, their acts in that character are totally null and void, unless they had been regularly appointed under and according to the Constitution. A de facto court of appeals cannot exist under a written Constitution which ordains one supreme court, and defines the qualification and duties of its judges, and prescribes the mode of appointing them. There cannot be more than one court of appeals in Kentucky as long as the Constitution shall exist, and that must necessarily be a court de jure. When the government is entirely revolutionized, and all its departments usurped by force or the voice of a majority, then prudence recommends and necessity enforces obedience to the authority of those who may act as the public functionaries, and in such a case the acts of a de facto executive, a de facto judiciary, and a de facto legislature must be recognized as valid. But this is required by political necessity. There is no government in action except the government de facto, because all the attributes of sovereignty have, by usurpation, been transferred from those who had been legally invested with them to others who, sustained by a power above the forms of law, claim to act, and do act, in their stead. But when the Constitution or form of government remains unaltered and supreme, there can be no de facto department or de facto office. The acts of the incumbents of such departments or office cannot be enforced conformably to the Constitution, and can be regarded as valid only when the government is overturned. When there is a constitutional executive and legis-

lature, there cannot be any other than a constitutional judiciary. Without a total revolution, there can be no such political solecism in Kentucky as a *de facto* court of appeals. There can be no such court while the Constitution has life and power. There has been none such. There might be under our Constitution, as there have been, *de facto* officers; but there never was, and never can be, under the present Constitution, a *de facto* office." And the court held that the gentlemen who acted as judges of the legislative tribunal were not incumbents of *de jure* or *de facto* offices, nor were they *de facto* officers of *de jure* offices, and the order below was reversed. \* \* \*

The case of *State v. Carroll*, 38 Conn. 449, 9 Am.Rep. 409, decided by the supreme court of Connecticut, upon which special reliance is placed by counsel, and which is mentioned with strong commendation as a land-mark of the law, in no way militates against the doctrine we have declared, but is in harmony with it. That case was this: The Constitution of Connecticut provided that all judges should be elected by its general assembly. An act of the legislature authorized the clerk of a city court, in case of the sickness or absence of its judge, to appoint a justice of the peace to hold the court during his temporary sickness or absence. A justice of the peace having thus been called in, and having acted, a question arose whether the judgments rendered by him were valid. The court held that whether the law was constitutional or not, he was an officer *de facto*, and, as such, his acts were valid. The opinion of Chief Justice Butler is an elaborate and admirable statement of the law, with a review of the English and American cases, on the validity of the acts of *de facto* officers, however illegal the mode of their appointment. It criticises the language of some cases, that the officer must act under color of authority conferred by a person having power, or *prima facie* power, to appoint or elect in the particular case; and it thus defines an officer *de facto*: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office are exercised—First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like; third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appoint-

ing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; fourth, under color of an election or an appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

Of the great number of cases cited by the chief justice, none recognizes such a thing as a *de facto* office, or speaks of a person as a *de facto* officer, except when he is the incumbent of a *de jure* office. The fourth head refers, not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act by which the officer is appointed to an office legally existing. That such was the meaning of the chief justice is apparent from the cases cited by him in support of the last position, to some of which reference will be made. \* \* \* [Here follows an analysis of certain of these cases in support of this argument, and a discussion of other points in the case.]

Judgment affirmed.

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### STATE v. GODWIN.

Supreme Court of North Carolina, 1898. 123 N.C. 697, 31 S.E. 221.

MONTGOMERY, J. The defendants were justices of the peace, and by virtue of their office (Code, § 2014) were a board of supervisors, and were required to look after the public roads in their townships. They were required also (Id. § 2015) to hold stated meetings for the purpose of consulting on the condition of the roads, and, by section 2024 of the Code, to make to the superior court, at term time, an annual report of the condition of the roads. The general assembly of 1897, in chapter 514, undertook to repeal the provisions of the Code, above referred to, as to Hertford county, and to impose upon others the duties required of the defendants. The defendants, after the enactment of the act of 1897, failed and refused to discharge the duties enjoined upon them under the provisions of the former law (the Code), and they were indicted on account of such failure and refusal. The act of 1897, in its entirety, is contrary to the provisions of our state constitution, and is therefore void. In the act a tax for making, repairing, and keeping up the public roads of Hertford county, a necessary county expense, was authorized to be levied upon property solely. The constitutional equation between the tax on the poll and that on property was not observed. It was contended here by the counsel of defendants that a part of the act was in conformity with the constitution, and that such part should be upheld; but, upon a careful reading of each of its provisions, it is manifest that they are all interdependent. The

county commissioners had refused from the beginning to act under the law of 1897, and hence the question of the appointment of the officers prescribed by that act, in place of the defendants, and the consequent effect of such appointment, does not arise. The whole act appears on its face to be one common plan for working the public roads of Hertford county, and the enforcement of its provisions depends entirely upon the tax provided for in the first section, and, that section being void because it disregards the equation of taxation between property and the poll, the whole act fails.

The question for decision, then, is, is one who is a public officer under a former provision of law compelled, under pain of indictment and punishment, to perform the duties of the office during the time when there was on the statute books a subsequent act unconstitutional in all of its provisions? The matter is an important one, both to the public and to the individual. With us, public office is a public trust, and public officers are merely the agents of the people. This fundamental principle of republican government may not always be recognized by the officer, but it is nevertheless the true theory. When the people, through their representatives, create a public office, and prescribe the duties of the officer, the people act for the common good, and the incumbent of the office is the mere instrument used for the general welfare. His gain or profit is not in contemplation of the law-makers. The public interest is the chief consideration. What an anomalous state of things would we have, then, if a person believing himself to be a public officer, because of the discharge of the duties which he thought he owed to the public, should afterwards be indicted and punished because the courts had held the act which created the office and prescribed its duties to be against the provisions of the constitution and void! Such a proposition would be equivalent to declaring that the individual officeholder must be wiser than the whole people, represented in their general assembly. Such a proposition, to us, seems opposed to every idea of justice. It could not be true. The criminal law cannot be invoked to punish one who acts as a public officer,—as an agent of the people,—and who in the discharge of a public duty had obeyed an act of the lawmaking power, even though the law be unconstitutional, unless the act itself had required the committal of a crime,—a thought which could not be entertained for a moment. And it makes no difference that in the case before the court the defendants are indicted for a refusal to perform certain duties under a former law attempted to be repealed by a subsequent unconstitutional statute, and not for doing positive acts under an unconstitutional law. The principle is the same in

both cases. The defendants here cannot be punished under the criminal law for failing and refusing to perform the duties of an office, which office, and the duties pertaining to it, had been sought to be repealed by a subsequent act of the legislature, afterwards declared by the courts to be unconstitutional. Until the subsequent statute was declared to be unconstitutional by competent authority, the defendants, under every idea of justice and under our theory of government, had a right to presume that the lawmaking power had acted within the bounds of the constitution, and their highest duty was to obey.

It is not necessary, to a proper determination of this case, to go into the realm of the effect of contracts, executed or executory, made by a person claiming to be a public officer, but where there is no lawfully created office. The counsel for the prosecution cited to the court, in support of his position, the case of *Norton v. Shelby Co.*, 118 U.S. 425, 6 S.Ct. 1121, and especially to that portion of the opinion wherein it was declared by the court that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never passed." The opinion in that case was rendered upon the effect of an executory contract made by one who claimed to be a public officer, the office having been created without authority of law. For the reasons given in this opinion, the case of *Norton v. Shelby Co.*, *supra*, does not apply to the facts in this case. Upon the special verdict the judgment of the court below was that the defendants were not guilty, and the judgment is affirmed. Affirmed.

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### CHICOT COUNTY DRAINAGE DISTRICT v. BAXTER STATE BANK

Supreme Court of the United States, 1940.  
308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

Respondents brought this suit in the United States District Court for the Western Division of the Eastern District of Arkansas to recover on fourteen bonds of \$1,000 each, which had been issued in 1924 by the petitioner, Chicot County Drainage District, organized under statutes of Arkansas, and had been in default since 1932.

In its answer, petitioner pleaded a decree of the same District Court in a proceeding instituted by petitioner to effect a plan of readjustment of its indebtedness under the Act of May 24, 1934, providing for "Municipal-Debt Readjustments". The decree recited that a plan of readjustment had been accepted by the hold-

ers of more than two-thirds of the outstanding indebtedness and was fair and equitable; that to consummate the plan and with the approval of the court petitioner had issued and sold new serial bonds to the Reconstruction Finance Corporation in the amount of \$193,500 and that these new bonds were valid obligations; that, also with the approval of the court, the Reconstruction Finance Corporation had purchased outstanding obligations of petitioner to the amount of \$705,087.06 which had been delivered in exchange for new bonds and canceled; that certain proceeds had been turned over to the clerk of the court and that the disbursing agent had filed his report showing that the Reconstruction Finance Corporation had purchased all the old bonds of petitioner other than the amount of \$57,449.30. The decree provided for the application of the amount paid into court to the remaining old obligations of petitioner, that such obligations might be presented within one year, and that unless so presented they should be forever barred from participating in the plan of readjustment or in the fund paid into court. Except for the provision for such presentation, the decree canceled the old bonds and the holders were enjoined from thereafter asserting any claim thereon.

Petitioner pleaded this decree, which was entered in March, 1936, as *res judicata*. Respondents demurred to the answer. Thereupon the parties stipulated for trial without a jury.

The evidence showed respondents' ownership of the bonds in suit and that respondents had notice of the proceeding for debt readjustment. The record of that proceeding, including the final decree, was introduced. The District Court ruled in favor of respondents and the Circuit Court of Appeals affirmed. 8 Cir., 103 F.2d 847. The decision was placed upon the ground that the decree was void because, subsequent to its entry, this Court in a proceeding relating to a municipal district in Texas had declared the statute under which the District Court had acted to be unconstitutional. *Ashton v. Cameron County District*, 298 U.S. 513, 56 S.Ct. 892, 80 L.Ed. 1309. In view of the importance of the question we granted certiorari. \* \* \*

The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton v. Shelby County*, 118 U.S. 425, 442, 6 S.Ct. 1121, 1125, 30 L.Ed. 178; *Chicago, Indianapolis & Louisville Rwy. Co. v. Hackett*, 228 U.S. 559, 566, 33 S.Ct. 581, 584, 57 L.Ed. 966. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with

qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified. Without attempting to review the different classes of cases in which the consequences of a ruling against validity have been determined in relation to the particular circumstances of past transactions, we appropriately confine our consideration to the question of *res judicata* as it now comes before us.

First. Apart from the contention as to the effect of the later decision as to constitutionality, all the elements necessary to constitute the defense of *res judicata* are present. It appears that the proceedings in the District Court to bring about a plan of readjustment were conducted in complete conformity to the statute. The Circuit Court of Appeals observed that no question had been raised as to the regularity of the court's action. The answer in the present suit alleged that the plaintiffs (respondents here) had notice of the proceeding and were parties, and the evidence was to the same effect, showing compliance with the statute in that respect. As parties, these bondholders had full opportunity to present any objections to the proceeding, not only as to its regularity, or the fairness of the proposed plan of readjustment, or the propriety of the terms of the decree, but also as to the validity of the statute under which the proceeding was brought and the plan put into effect. Apparently no question of validity was raised and the cause proceeded to decree on the assumption by all parties and the court itself that the statute was valid. There was no attempt to review the decree. If the general principles governing the defense of *res judicata* are applicable, these bondholders, having the opportunity to raise the question of invalidity, were not the less bound by the decree because they failed to raise it. \* \* \*

Second. The argument is pressed that the District Court was sitting as a court of bankruptcy, with the limited jurisdiction

conferred by statute, and that, as the statute was later declared to be invalid, the District Court was without jurisdiction to entertain the proceeding and hence its decree is open to collateral attack. We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally. \* \* \*

Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination. If the contention is one as to validity, the question is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application. In the present instance it is suggested that the situation of petitioner, Chicot County Drainage District, is different from that of the municipal district before the court in the Ashton case. Petitioner contends that it is not a political subdivision of the State of Arkansas but an agent of the property owners within the District. See Drainage District No. 7 of Poinsett County v. Hutchins, 184 Ark. 521, 42 S.W.2d 996. We do not refer to that phase of the case as now determinative but merely as illustrating the sort of question which the District Court might have been called upon to resolve had the validity of the Act of Congress in the present application been raised. As the question of validity was one which had to be determined by a judicial decision, if determined at all, no reason appears why it should not be regarded as determinable by the District Court like any other question affecting its jurisdiction. There can be no doubt that if the question of the constitutionality of the statute had actually been raised and decided by the District Court in the proceeding to effect a plan of debt readjustment in accordance with the statute, that determination would have been final save as it was open to direct review upon appeal. Stoll v. Gottlieb, *supra*.

The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled

principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, "but also as respects any other available matter which might have been presented to that end". \* \* \*

The judgment is reversed and the cause is remanded to the District Court with direction to dismiss the complaint.

#### NOTE

1. The scope and effect of a decision that a statute is unconstitutional as applied to the case before the court depends upon the basis on which the invalidity rests. If the factor rendering its application invalid in the particular case is present in every case within its terms, then it is for all practical purposes wholly invalid. If the invalidating factor is not necessarily present in all cases within its terms, its application to those cases in which that factor is absent will not be invalid unless another invalidating factor is present. E.g., a decision that a state statute fixing intra state railroad rates is confiscatory as applied to one railroad does not invalidate such rates as applied to another railroad; see *Minnesota Rate Cases*, 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas.1916A, 18 (1913). But it has been held that "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas." *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

2. A statute valid at one time may be rendered invalid as a result of changing circumstances; *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841 (1924); *Vigean v. Postal Tel. Cable Co.*, 260 Mass. 335, 157 N.E. 651, 53 A.L.R. 867 (1927).

3. Persons who have relied upon erroneous decisions on the constitutionality of a statute are frequently protected against the logical consequences of a subsequent over-ruling decision: *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L.Ed. 520 (1864); *Iowa v. O'Neil*, 147 Iowa 513, 126 N.W. 454, 33 L.R.A.,N.S., 788, Ann.Cas.1912B, 691 (1910).

4. See on the general subject the following: O. P. Field, *The Effect of an Unconstitutional Statute*, 100 Cent.L.Jour. 145 (1927); *The Effect of an Unconstitutional Statute in the Law of Public Officers: Effect on Official Status*, 13 Minn.L.Rev. 439 (1929); *The Effect of an Unconstitutional Statute in the Law of Public Officers: Liability of an Officer for Action or Non-Action*, 77 U.Pa.L.Rev. 155 (1928); *The Status of a Municipal Corporation Organized under an Unconstitutional Statute*, 27 Mich.L.Rev. 523 (1929); *The Status of a Private Corporation Organized under an Unconstitutional Statute*, 17 Calif.L.Rev. 327 (1929); *Government Bonds and Private Contracts under Unconstitutional Statutes*, 17 Ia.L.Rev. 1 (1932); *The Recovery of Illegal and Unconstitutional Taxes*, 45 Harv.L.Rev. 501 (1932); M. P. Rapacz, *Protection of Officers Who Act under Unconstitutional Statutes*, 11 Minn.L.Rev. 585 (1927); Note, *The Effect of Declaring a Statute Unconstitutional*, 29 Col.L.

Rev. 1140 (1929); Note, What is the Effect of a Court's Declaring a Legislative Act Unconstitutional, 39 Harv.L.Rev. 373 (1926); Note, The Permanence of Constitutionality, 40 Yale L.Jour. 1101 (1931); Freeman, The Protection Afforded Against the Retroactive Effects of an Over-Ruling Decision, 18 Col.L.Rev. 230 (1918).

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POLLOCK v. FARMERS' LOAN & TRUST CO., 1895, 158 U.S. 601, 635-637, 15 S.Ct. 912, 39 L.Ed. 1108, Mr. Chief Justice FULLER (after holding invalid certain parts of the federal income tax law of 1894, taxing all incomes over \$4,000):

"Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole.

"It is elementary that the same statute may be in part constitutional and in part unconstitutional, and, if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections 27 to 37, inclusive, which relate to the subject which has been under discussion; and, as to them, we think the rule laid down by Chief Justice Shaw in *Warren v. Charlestown*, 2 Gray, Mass., 84, is applicable,—that if the different parts 'are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.' Or, as the point is put by Mr. Justice Matthews in *Poindexter v. Greenhow*, 114 U.S. 270, 304, 5 S.Ct. 903, 962, 29 L.Ed. 185: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced, as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing, by itself, to enact.' And again, as stated by the same eminent judge in *Sprague v. Thompson*, 118 U.S. 90, 95, 6 S.Ct. 988, 30 L.Ed. 115, where it was urged that certain illegal exceptions in a section of a statute might be disregarded, but that the rest could stand: 'The

insuperable difficulty with the application of that principle of construction to the present instance is that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what, confessedly, the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted, in view of the illegality of the exceptions.'

"According to the census, the true valuation of real and personal property in the United States in 1890 was \$65,037,091,197, of which real estate with improvements thereon made up \$39,544,544,333. Of course, from the latter must be deducted, in applying these sections, all unproductive property and all property whose net yield does not exceed \$4,000; but, even with such deductions, it is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. If that be stricken out, and also the income from all invested personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain, in substance, a tax on occupations and labor. We cannot believe that such was the intention of congress. We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations. But this is not such an act, and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated, except in connection with the taxation considered as an entirety, we are constrained to conclude that sections 27 to 37, inclusive, of the act, which became a law, without the signature of the president, on August 28, 1894, are wholly inoperative and void."

#### NOTE

1. See R. L. Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv.L.Rev. 76 (1937); Note, Effect of Separability Clause, 40 Harv.L.Rev. 626 (1927); Note, Effect of Separability Clause, 25 Mich.L.Rev. 523 (1927).

2. The issue of separability with respect to state statutes is one ultimately determinable by the courts of the state whose statute is involved; *Dorchy v. Kansas*, 264 U.S. 286, 44 S.Ct. 323, 68 L.Ed. 686 (1924); *Watson v. Buck*, 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416 (1941).

3. A special problem arises where an exception from a general statutory rule produces an unconstitutional discrimination. As to the methods adopted for saving at least some part of the statute, see *Ex parte Davis*, 21 F. 396 (C.C.Ky. 1884); *State v. Erickson*, 159 Minn. 287, 198 N.W. 1000 (1924); *State v. Barkley*, 192 N.C. 184, 184 S.E. 454 (1926); *Burrow v. Kapfhammer*, 284 Ky. 753, 145 S.W.2d 1067 (1940). See also Note, *The Effect of an Unconstitutional Exception Clause upon the Remainder of a Statute*, 55 Harv. L.Rev. 1030 (1942).

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### OKLAHOMA OPERATING CO. v. LOVE.

Supreme Court of the United States, 1920. 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596.

Mr. Justice BRANDEIS delivered the opinion of the Court. \* \* \*

The order of the Commission prohibiting the company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates for the service. It was, therefore, a legislative order; and under the Fourteenth Amendment plaintiff was entitled to an opportunity for a review in the courts of its contention that the rates were not compensatory. *Chicago, etc., Railway Co. v. Minnesota*, 134 U.S. 418, 456-458, 10 S.Ct. 462, 33 L.Ed. 970; *Ex parte Young*, 209 U.S. 123, 165, 166, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R.A., N.S., 932, 14 Ann.Cas. 764. The Constitution of the state prohibited any of its courts from reviewing any action of the Commission within its authority except by way of appeal to the Supreme Court (article 9, section 20); and the Supreme Court had construed the Constitution and applicable provisions of the statutes as not permitting a direct appeal from orders fixing rates. *Harriss-Irby Cotton Co. v. State*, supra, 31 Okl. 603, 122 P. 163. On behalf of the Commission it was urged at the oral argument that a judicial review of the order fixing rates might have been had also by writ of mandamus or of prohibition issuing out of the Supreme Court of the state. But, in view of the provision of the state Constitution just referred to, it must be assumed, in the absence of a decision of a state court to the contrary, that neither remedy, even if otherwise available, could be used to review an order alleged to be void because confiscatory. The proviso "that the writs of mandamus and prohibition shall lie from the Supreme Court to the Commission in all cases where such writs, respectively, would lie to any inferior court or officer," appears to have no application here. The challenge of a prescribed rate as being confiscatory raises a question, not as to the scope of the Commission's authority, but of the correctness of the exercise of its judgment. Compare *Hirsh v. Twyford*, 40 Okl. 220, 230, 139 P. 313.

So it appears that the only judicial review of an order fixing rates possible under the laws of the state was that arising in proceedings to punish for contempt. The Constitution endows the Commission with the powers of a court to enforce its orders by such proceedings. Article 9, sections 18, 19. By boldly violating an order a party against whom it was directed may provoke a complaint; and if the complaint results in a citation to show cause why he should not be punished for contempt, he may justify before the Commission by showing that the order violated was invalid, unjust or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is opened to him by way of appeal on the whole record to the Supreme Court. But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident. The penalty for refusal to obey an order may be \$500; and each day's continuance of the refusal after service of the order it is declared "shall be a separate offense." The penalty may apparently be imposed for each instance of violation of the order. In *Oklahoma Gin Co. v. State*, 252 U.S. 339, 40 S.Ct. 341, 64 L.Ed. 600, decided this day, it appears that the full penalty of \$500, with the provision for the like penalty for each subsequent day's violation of the order, was imposed in each of three complaints there involved, although they were merely different instances of charges in excess of a single prescribed rate. Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates. \* \* \*

The plaintiff is entitled to a temporary injunction restraining the Corporation Commission from enforcing the penalties. Since this suit was commenced, the Legislature has provided by chapter 52, section 3, of the Laws of 1919 (Sess.Laws Oklahoma 1919, p. 87) that in actions arising before the Commission under section 8235 there shall be the same right of direct appeal to the Supreme Court of the state as had theretofore existed in the case of transportation and transmission companies under article 9, section 20, of the Constitution. But as plaintiff was obliged to resort to a federal court of equity for relief it ought to retain jurisdiction of the cause in order to make that relief as full and complete as the circumstances of the case and the nature of the proofs may require. The suit should, therefore, proceed for the purpose of determining whether the maximum rates fixed by the Commission are, under present conditions, confiscatory. If

they are found to be so, a permanent injunction should issue to restrain their enforcement either by means of penalties or otherwise, as through an assertion by customers of alleged rights arising out of the Commission's orders. *Missouri v. Chicago, Burlington & Quincy R. R.*, 241 U.S. 533, 538, 36 S.Ct. 715, 60 L.Ed. 1148. If upon final hearing the maximum rates fixed should be found not to be confiscatory, a permanent injunction should, nevertheless, issue to restrain enforcement of penalties accrued pendente lite, provided that it also be found that the plaintiff had reasonable ground to contest them as being confiscatory.

It does not follow that the Commission need be restrained from proceeding with an investigation of plaintiff's rates and practices, so long as its findings and conclusions are subjected to the review of the District Court herein. Indeed, such investigation and the results of it might with appropriateness be made a part of the final proofs in the cause.

These conclusions require that the decree of the District Court be reversed and that the case be remanded for further proceedings in conformity with this opinion.

Reversed.

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### COLEGROVE v. GREEN

Supreme Court of the United States, 1946.

328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432. Rehearing denied, 329 U.S. 825, 67 S.Ct. 118, 91 L.Ed. 701.

Mr. Justice FRANKFURTER announced the judgment of the Court and an opinion in which Mr. Justice REED and Mr. Justice BURTON concur.

This case is appropriately here, under § 266 of the Judicial Code, 28 U.S.C. § 380, 28 U.S.C.A. § 380, on direct review of a judgment of the District Court of the Northern District of Illinois, composed of three judges, dismissing the complaint of these appellants. Petitioners are three qualified voters in Illinois districts which have much larger populations than other Illinois Congressional districts. They brought this suit against the Governor, the Secretary of State, and the Auditor of the State of Illinois, as members ex officio of the Illinois Primary Certifying Board, to restrain them, in effect, from taking proceedings for an election in November 1946, under the provisions of Illinois law governing Congressional districts. Illinois Laws of 1901, p. 3. Formally, the appellees asked for a decree, with its incidental relief, § 274d Judicial Code, 28 U.S.C. § 400, 28 U.S.C.A. § 400, declaring these provisions to be invalid because they violated various provisions of the United States Constitu-

tion and § 3 of the Reapportionment Act of August 8, 1911, 37 Stat. 13, 2 U.S.C.A. § 3, as amended, 2 U.S.C. § 2a, 2 U.S.C.A. § 2a, in that by reason of subsequent changes in population the Congressional districts for the election of Representatives in the Congress created by the Illinois Laws of 1901, Ill.Rev.Stat. Ch. 46, 1945, §§ 154-156, lacked compactness of territory and approximate equality of population. The District Court, feeling bound by this Court's opinion in *Wood v. Broom*, 287 U.S. 1, 53 S.Ct. 1, 77 L.Ed. 131, dismissed the bill. 64 F.Supp. 632.

The District Court was clearly right in deeming itself bound by *Wood v. Broom*, *supra*, and we could also dispose of this case on the authority of *Wood v. Broom*. \* \* \*

But we also agree with the four Justices (Brandeis, Stone, Roberts, and Cardozo, JJ.) who were of opinion that the bill in *Wood v. Broom*, *supra*, should be "dismissed for want of equity." To be sure, the present complaint, unlike the bill in *Wood v. Broom*, was brought under the Federal Declaratory Judgment Act which, not having been enacted until 1934, was not available at the time of *Wood v. Broom*. But that Act merely gave the federal courts competence to make a declaration of rights even though no decree of enforcement be immediately asked. It merely permitted a freer movement of the federal courts within the recognized confines of the scope of equity. The Declaratory Judgment Act "only provided a new form of procedure for the adjudication of rights in conformity" with "established equitable principles." *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 300, 63 S.Ct. 1070, 1074, 87 L.Ed. 1407. And so, the test for determining whether a federal court has authority to make a declaration such as is here asked, is whether the controversy "would be justiciable in this Court if presented in a suit for injunction \* \* \*." *Nashville C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 262, 53 S.Ct. 345, 348, 77 L.Ed. 730, 87 A.L.R. 1191.

We are of opinion that the petitioners ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.

This is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens. The basis for the suit is not a private wrong, but

a wrong suffered by Illinois as a polity. Compare *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 and *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281, with *Giles v. Harris*, 189 U.S. 475, 23 S.Ct. 639, 47 L.Ed. 909. In effect this is an appeal to the federal courts to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation. Because the Illinois legislature has failed to revise its Congressional Representative districts in order to reflect great changes, during more than a generation, in the distribution of its population, we are asked to do this, as it were, for Illinois.

Of course no court can affirmatively remap the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid. The result would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a state-wide ticket. The last stage may be worse than the first. The upshot of judicial action may defeat the vital political principle which led Congress, more than a hundred years ago, to require districting. This requirement, in the language of Chancellor Kent, "was recommended by the wisdom and justice of giving, as far as possible, to the local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave the aggregate minority of the people in a state, though approaching perhaps to a majority, to be wholly overpowered by the combined action of the numerical majority, without any voice whatever in the national councils." 1 Kent, Commentaries (12th ed., 1873) \*230-31, n. (c). Assuming acquiescence on the part of the authorities of Illinois in the selection of its Representatives by a mode that defies the direction of Congress for selection by districts, the House of Representatives may not acquiesce. In the exercise of its power to judge the qualifications of its own members, the House may reject a delegation of Representatives-at-Large. Article I, § 5, Cl. 1. For the detailed system by which Congress supervises the election of its members, see e. g., 2 U.S.C. §§ 201-226, 2 U.S.C.A. §§ 201-226; Bartlett, *Contested Elections in the House of Representatives* (2 vols.); Alexander, *History of the Procedure of the House of Representatives* (1916) c. XVI. Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.

The petitioners urge with great zeal that the conditions of which they complain are grave evils and offend public morality. The Constitution of the United States gives ample power to provide against these evils. But due regard for the Constitution as a viable system precludes judicial correction. Authority for dealing with such problems resides elsewhere. Article I, section 4 of the Constitution provides that "The Times, Places and Manner of Holding Elections for \* \* \* Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, \* \* \*." The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people. Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress. An aspect of government from which the judiciary, in view of what is involved, has been excluded by the clear intention of the Constitution cannot be entered by the federal courts because Congress may have been in default in exacting from States obedience to its mandate. \* \* \*

To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, "on Demand of the Executive Authority," Art. IV, § 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But the fulfillment of this duty cannot be judicially enforced. *Commonwealth of Kentucky v. Dennison*, 24 How. 66, 16 L.Ed. 717. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion. *State of Mississippi v. Johnson*, 4 Wall. 475, 18 L.Ed. 437. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.

Dismissal of the complaint is affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case. Mr. Justice RUTLEDGE concurred in a separate opinion. Mr. Justice BLACK dissented in an opinion concurred in by Justices DOUGLAS and MURPHY.

#### NOTE

1. See also *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L. Ed. 1385, 122 A.L.R. 695 (1939).
2. For a state decision dealing with the problem of the reported case, see *Fergus v. Marks*, 321 Ill. 510, 152 N.E. 557, 46 A.L.R. 960 (1926).
3. See W. F. Dodd, *Judicially Non-Enforceable Provisions of Constitutions*, 80 U.Pa.L.Rev. 54 (1931).

## CHAPTER 3

### FUNCTIONAL DISTRIBUTION OF GOVERNMENTAL POWERS

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#### SPRINGER v. GOVERNMENT OF THE PHILIPPINE ISLANDS.

Supreme Court of the United States, 1928. 277 U.S. 189, 48 S.Ct. 480.  
72 L.Ed. 845.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

These cases, presenting substantially the same question, were argued and will be considered and disposed of together. In each case an action in the nature of quo warranto was brought in the court below challenging the right to hold office of directors of certain corporations organized under the legislative authority of the Philippine Islands; No. 564 involving directors of the National Coal Company, and No. 573 involving directors of the Philippine National Bank.

The National Coal Company was created by Act 2705, approved March 10, 1917, subsequently amended by Act 2822, approved March 5, 1919. The Governor General, under the provisions of the amended act, subscribed on behalf of the Philippine Islands for substantially all of the capital stock. The act provides:

"The voting power of all such stock owned by the government of the Philippine Islands shall be vested exclusively in a committee, consisting of the Governor General, the President of the Senate and the Speaker of the House of Representatives."

The National Bank was created by Act 2612, approved February 4, 1916, subsequently amended by Act 2747, approved February 20, 1918, and Act 2938, approved January 30, 1921. The authorized capital of the bank, as finally fixed, was 10,000,000 pesos, consisting of 100,000 shares, of which, in pursuance of the legislative provisions, the Philippine Government acquired and owns 97,332 shares; the remainder being held by private persons. By the original act the voting power of the government-owned stock was vested exclusively in the Governor General, but by the amended acts now in force that power was "vested exclusively in a board, the short title of which shall be

'board of control,' composed of the Governor General, the President of the Senate, and the Speaker of the House of Representatives." The Governor General was also divested of the power of appointment of the president and vice president of the bank, originally vested in him, and their election was authorized to be made by the directors from among their own number. Provision was also made for a general manager, to be appointed or removed by the board of directors with the advice and consent of the board of control. The manager was to be chief executive of the bank, with an annual salary to be fixed by the board of directors with the approval of the board of control. Further duties were conferred upon the board of control in connection with the management of the bank which it does not seem necessary to set forth. \* \* \*

The congressional legislation referred to as the Organic Act is the enactment of August 29, 1916, c. 416, 39 Stat. 545 (48 U.S.C.A. § 1001 et seq.), which constitutes the fundamental law of the Philippine Islands, and bears a relation to their governmental affairs not unlike that borne by a state Constitution to the state. The act contains a Bill of Rights, many of the provisions of which are taken from the Federal Constitution. It lays down fundamental rules in respect of taxation, shipping, customs duties, etc. Section 8 of the act (48 U.S.C.A. § 1041) provides:

"That general legislative power, except as otherwise herein provided, is hereby granted to the Philippine Legislature, authorized by this act."

And by section 12 (48 U.S.C.A. § 1043) this legislative power is vested in a Legislature, to consist of two houses, one the Senate and the other the House of Representatives. Provision is made (sections 13, 14 and 17 [48 U.S.C.A. §§ 1044, 1045, 1048]) for memberships, terms, and qualifications of the members of each house. By section 21 (48 U.S.C.A. § 1111) it is provided "that the supreme executive power shall be vested in an executive officer, whose official title shall be 'the Governor General of the Philippine Islands.'" He is given "general supervision and control of all of the departments and bureaus of the government in the Philippine Islands as far as is not inconsistent with the provisions of this act." He is made "responsible for the faithful execution of the laws of the Philippine Islands and of the United States operative within the Philippine Islands." Other powers of an important and comprehensive character also are conferred upon him. By section 22 (48 U.S.C.A. § 1114) the executive departments of the Philippine government, as then authorized by law, are continued until otherwise provided by the Legislature. The Legislature is authorized by appropriate

legislation to "increase the number or abolish any of the executive departments, or make such changes in the names and duties thereof as it may see fit," and "provide for the appointment and removal of the heads of the executive departments by the Governor General." Then follows the proviso:

"That all executive functions of the government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General."

Section 26 (48 U.S.C.A. §§ 1071-1074, 1078) recognizes the existing Supreme Court and courts of first instance of the Islands, and continues their jurisdiction as heretofore provided, with such additional jurisdiction as should thereafter be prescribed by law.

Thus the Organic Act, following the rule established by the American Constitutions, both state and federal, divides the government into three separate departments—the legislative, executive, and judicial. Some of our state Constitutions expressly provide in one form or another that the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other. Other Constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments. See *Kilbourn v. Thompson*, 103 U.S. 168, 190, 191, 26 L.Ed. 377. And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism. That the principle is implicit in the Philippine Organic Act does not admit of doubt. See *Abueva v. Wood*, 45 Phil.Rep. 612, 622, 628, et seq.

It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the Legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various Constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.

Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further

upon the general subject, since it has so recently received the full consideration of this court. *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160.

Not having the power of appointment, unless expressly granted or incidental to its powers, the Legislature cannot ingraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection, though the case might be different if the additional duties were devolved upon an appointee of the executive. *Shoemaker v. United States*, 147 U.S. 282, 300, 301, 13 S.Ct. 361, 37 L.Ed. 170. Here the members of the Legislature who constitute a majority of the "board" and "committee," respectively, are not charged with the performance of any legislative functions or with the doing of anything which is in aid of the performance of any such functions by the Legislature. Putting aside for the moment the question whether the duties devolved upon these members are vested by the Organic Act in the Governor General, it is clear that they are not legislative in character, and still more clear that they are not judicial. The fact that they do not fall within the authority of either of these two constitutes logical ground for concluding that they do fall within that of the remaining one of the three among which the powers of government are divided. Compare *Myers v. United States*, *supra*, pages 117, 118, 47 S.Ct. 25.

Assuming, for present purposes, that the duty of managing this property, namely, the government-owned shares of stock in these corporations, is not sovereign but proprietary in its nature, the conclusion must be the same. The property is owned by the government, and the government in dealing with it, whether in its quasi sovereign or its proprietary capacity, nevertheless acts in its governmental capacity. There is nothing in the Organic Act, or in the nature of the legislative power conferred by it, to suggest that the Legislature in acting in respect of the proprietary rights of the government may disregard the limitation that it must exercise legislative and not executive functions. It must deal with the property of the government by making rules, and not by executing them. The appointment of managers (in this instance corporate directors) of property or a business, is essentially an executive act which the Legislature is without capacity to perform directly or through any of its members.

Whether the members of the "board" or the "committee" are public officers in a strict sense, we do not find it necessary to determine. They are public agents at least, charged with the exercise of executive functions and, therefore, beyond the appointing power of the Legislature. *Stockman v. Leddy*, 55 Colo.

24, 129 P. 220, Ann.Cas.1916E, 1052, involved a case very much like that now under consideration. The state Legislature had created a committee of its own members to investigate the rights of the state in the flowing waters therein. The committee was authorized to determine what steps were necessary to be taken to protect the rights of the state, to employ counsel, etc. There was no claim that the investigation was for the purpose of ascertaining facts to aid in future legislation or to assist the Legislature in its legislative capacity, but it was for the purpose of enabling the committee itself to reach a conclusion as to what should be proper to do in order to protect the rights of the state. The court, in holding the act unconstitutional, said (page 31, 129 P. 223):

"In other words, the General Assembly not only passed an act—that is, made a law—but it made a joint committee of the Senate and the House as its executive agent to carry out that law. This is a clear and conspicuous instance of an attempt by the General Assembly to confer executive power upon a collection of its own members."

And the court held that this was invalid under the provisions of the state Constitution respecting the tripartite division of governmental powers. See, also, *Clark v. Stanley*, 66 N.C. 59, 8 Am.Rep. 488; *State ex rel. Howerton v. Tate*, 68 N.C. 546.

\* \* \*

Whether the Philippine Legislature, in view of the alternative form of the provision vesting all executive functions' directly under the Governor General or within one of the executive departments under his supervision and control, might devolve the voting power upon the head of an executive department or an appointee of such head, we do not now decide. The Legislature has not undertaken to do so; and, in the absence of such an attempt, it necessarily results that the power must be exercised directly by the Governor General or by his appointee, since he is the only executive now definitely authorized by law to act.

The judgments in both cases are affirmed.

Mr. Justice HOLMES dissented.

#### NOTE

1. It has been held that the provisions of the Constitution of the United States do not require a State to embody the principle of the separation of powers and the prohibition against delegation of legislative powers in the structure of its government; *Dreyer v. People of State of Illinois*, 187 U.S. 71, 23 S.Ct. 28, 47 L.Ed. 79 (1902); *Forsyth v. City of Hammond*, 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095 (1897). The constitutions of the several states do include these principles so far as the governmental organs of the states

are concerned, but not with respect to municipal governments; *Eckerson v. Des Moines*, 137 Iowa 452, 115 N.W. 177 (1908).

2. For a discussion of federal constitutional limitations applicable when a state confers both legislative and judicial functions upon a single state governmental organ, see *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908).

3. For a discussion of a state constitutional problem similar to that in the reported case, see *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 44 S.E.2d 88 (1947).

4. For general discussion of principles of separation and delegation of powers, see F. Green, *Separation of Governmental Powers*, 29 *Yale L.Jour.* 369 (1920); M. P. Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 *U.Chicago L.Rev.* 385 (1935); Note, *Legislative, Judicial, and Executive Powers—Their Distinction—Delegation of Powers*, 15 *Ill.L.Rev.* 108 (1920); L. L. Jaffe, *An Essay on Delegation of Legislative Power*, 47 *Col.L.Rev.* 359, 561 (1947).

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### POPE v. UNITED STATES

Supreme Court of the United States, 1944.  
323 U.S. 1, 65 S.Ct. 16, 89 L.Ed. 3.

Mr. Chief Justice STONE delivered the opinion of the Court.

The question for decision is whether Congress exceeded its constitutional authority in enacting the Special Act of February 27, 1942, 56 Stat. 1122, by which, "notwithstanding any prior determination" or "any statute of limitations", it purported to confer jurisdiction on the Court of Claims to "hear [and] determine", and directed it to "render judgment" upon, certain claims of petitioner against the Government in conformity to directions given in the Act.

Petitioner brought the present proceeding in the Court of Claims to recover upon his claims as specified and sanctioned by the Special Act. The court dismissed the proceeding on the ground that the Act was unconstitutional. 53 F.Supp. 570, 100 Ct.Cl. 375. It thought that in requiring the court to make a mathematical calculation of the amount of petitioner's claims upon the basis of data enumerated in the Act and to give judgment for the amount so ascertained notwithstanding the rejection of those claims in an earlier suit in the Court of Claims, the Act was an unconstitutional encroachment by Congress upon the judicial function of the court. Holding that it was free to ignore the congressional command because given without constitutional authority, the court gave judgment dismissing the proceeding.

The case comes here on petition for certiorari which assigns as error the ruling below that the Congressional mandate was without constitutional authority. Because of the importance of the

questions involved we issued the writ, 321 U.S. 761, 64 S.Ct. 846. For reasons which will presently appear, we hold that we have jurisdiction to review the judgment below.

Several years before the enactment of the Special Act, petitioner brought suit in the Court of Claims to recover amounts alleged to be due upon his contract with the Government for the construction of a tunnel as a part of the water system of the District of Columbia. The construction involved certain excavation and certain filling of the excavated space, in part with concrete and in part with dry packing and grout. Dry packing consists of closely packed broken rock, into which is pumped the grout, a thin liquid mixture of sand, cement and water, which, when it hardens, serves to solidify and strengthen the dry packing.

Included in the demands for which the suit was brought were certain claims which are now asserted in this proceeding. They comprise a claim for additional excavation and concrete work alleged to have been required because of certain orders of the contracting officer, and a claim for dry packing and grout furnished by petitioner and placed by him in certain excavated space outside the so-called "B" line shown on the contract drawings. The "B" line marked the outer limits of the tunnel beyond which, by the terms of the contract, petitioner was not to be paid for excavation.

In the first suit it appeared that petitioner sought recovery for excavation, for which he had not been paid, of the space at the top of the tunnel where the contracting officer had lowered the "B" line by three inches, thus decreasing the space for the excavation for which the contract authorized payment to be made. The Court of Claims denied recovery of this item. The contracting officer had also directed the omission of certain timber supports or lagging required by the contract to be placed on the side walls of certain sections of the tunnel. Cave-ins from the sides resulted, making it necessary that the caved-in material be removed and that the resulting space be filled with concrete, all at increased expense to petitioner. The Court of Claims made findings showing the amount of the additional excavation and concrete work claimed, but denied recovery on these items because the order of the contracting officer for the additional work involved a change in the contract which was not in writing as the contract required.

The Court of Claims also denied petitioner's claim for dry packing and grout. It was of opinion that the Government had received the benefit of and was liable for whatever dry packing petitioner had done and for so much of the grout as had actually

found its way into the dry packed space and had remained there. But it denied recovery because of deficiency in the proof as to the extent of this space. The only proof offered was the "liquid method" of computation, based on the number of bags of cement used in the preparation of all the grout furnished by petitioner, the cement constituting a fixed proportion of the grout. The court held, with the Government, that the seepage of the grout into areas outside that dry packed rendered the liquid method an unreliable measure for determining either the volume of the dry packing or the amount of the grout required for it. The court gave judgment accordingly, while allowing to petitioner other claims upon his contract with which we are not here concerned. Petitioner's motions for a new trial were denied by the Court of Claims, and this Court denied certiorari. 303 U.S. 654, 58 S.Ct. 761, 82 L.Ed. 1114.

The Special Act of Congress directed the Court of Claims to "render judgment at contract rates upon the claims" of petitioner for "certain work performed for which he has not been paid, but of which the Government has received the use and benefit", and gave jurisdiction to this Court to review the judgment by certiorari. Section 2 of the Act defined the work to be compensated as "the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper 'B' or 'pay' line three inches, and as to omit the timber lagging from the side-walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing." The Act further directed that the court should consider as evidence in the case "any or all evidence" taken by either party in the earlier suit, "together with any additional evidence which may be taken."

The Court of Claims in construing the Special Act said (53 F.Supp. page 571, 100 Ct.Cl. page 379): "A rereading of Section 2 of the act will show that the task which the court is directed to perform is a small and unimportant one. It is directed to refer to its previous findings, take certain cubic measurements and certain numbers of bags of cement which are recited there by reference, multiply those figures by the several unit prices

stipulated in the contract for the several kinds of work, add the results, and render judgment for the plaintiff for the sum. If this reading of Section 2 is correct, not only does the special act purport to confer upon the plaintiff the unusual privilege of litigating the same case a second time in a court which once finally decided it, and applying a second time for a review in the Supreme Court of the United States, which once considered and denied such a review. The special act also purports to decide the questions of law which were in the case upon its former trial and would, but for the act, be in it now, and to decide all questions of fact except certain simple computations." So construed it thought the Special Act directed the Court of Claims to decide again the case or controversy which it had decided in the first suit, "to decide it for the plaintiff, and give him a judgment for an amount" determined by a "simple computation, based upon data referred to in the special act." This it concluded Congress could not "effectively direct."

For this conclusion it relied upon *United States v. Klein*, 13 Wall. 128, 20 L.Ed. 519, in which this Court ruled that Congress was without constitutional power to prescribe a rule of decision for a case pending on appeal in this Court so as to require it to order dismissal of the suit in which the Court of Claims had given judgment for the claimant. Decision was rested upon the ground that the judicial power over the pending appeal resided with this Court in the exercise of its appellate jurisdiction, and that Congress was without constitutional authority to control the exercise of its judicial power and that of the court below by requiring this Court to set aside the judgment of the Court of Claims by dismissing the suit.

As the opinion in the *Klein* case pointed out, page 144, 145 of 13 Wall., 20 L.Ed. 519, the Act of March 17, 1866, 14 Stat. 9, conferred on the Court of Claims judicial power by giving it authority to render final judgments in those cases and controversies which, pursuant to existing statutes, had been previously litigated before it. By later statutes this authority was extended to future cases and the Court has since exercised the judicial power thus conferred upon it. See *Ex parte Bakelite Corp'n*, 279 U.S. 438, 454, 49 S.Ct. 411, 414, 73 L.Ed. 789; *United States v. Jones*, 119 U.S. 477, 7 S.Ct. 283, 30 L.Ed. 440. We do not consider just what application the principles announced in the *Klein* case could rightly be given to a case in which Congress sought, *pendente lite*, to set aside a judgment of the Court of Claims in favor of the Government and to require relitigation of the suit. For we do not construe the Special Act as requiring the Court of Claims to set aside the judgment in a case already

decided or as changing the rules of decision for the determination of a pending case.

Before the Special Act the claims of petitioner on his contract with the Government had been passed upon judicially and merged in a judgment which was final. *United States v. Jones*, supra; *In re Sanborn*, 148 U.S. 222, 225, 13 S.Ct. 577, 578, 37 L.Ed. 429; *Luckenbach S. S. Co. v. United States*, 272 U.S. 533, 536 et seq., 47 S.Ct. 186, 187, 71 L.Ed. 394. This Court denied certiorari, and the judgment, which remains undisturbed by any subsequent legislative or judicial action, conclusively established that petitioner was not entitled to recover on his claims. The Special Act did not purport to set aside the judgment or to require a new trial of the issues as to the validity of the claims which the Court had resolved against petitioner. While inartistically drawn the Act's purpose and effect seem rather to have been to create a new obligation of the Government to pay petitioner's claims where no obligation existed before. And such being its effect, the Act's impact upon the performance by the Court of Claims of its judicial duties seems not to be any different than it would have been if petitioner's claims had not been previously adjudicated there.

We perceive no constitutional obstacle to Congress' imposing on the Government a new obligation where there had been none before, for work performed by petitioner which was beneficial to the Government and for which Congress thought he had not been adequately compensated. The power of Congress to provide for the payment of debts, conferred by § 8 of Article I of the Constitution, is not restricted to payment of those obligations which are legally binding on the Government. It extends to the creation of such obligations in recognition of claims which are merely moral or honorary. \* \* \*

Congress, by the creation of a legal, in recognition of a moral, obligation to pay petitioner's claims plainly did not encroach upon the judicial function which the Court of Claims had previously exercised in adjudicating that the obligation was not legal. Nor do we think it did so by directing that court to pass upon petitioner's claims in conformity to the particular rule of liability prescribed by the Special Act and to give judgment accordingly.

\* \* \*

Congress having exercised its constitutional authority to impose on the Government a legally binding obligation, the decisive question is whether it invaded the judicial province of the Court of Claims by directing it to determine the extent of the obligation by reference, as directed, to the specified facts, and to give judgment for that amount. In answering, it is important that

the Act contemplated that petitioner should bring suit on his claims in the usual manner, that the court was given jurisdiction to decide it, and that petitioner by bringing the suit has invoked, for its decision, whatever judicial power the court possesses. Cf. *United States v. Realty Company*, supra. In this posture of the case it is pertinent to inquire what, if anything, Congress added to or subtracted from the judicial duties of the Court of Claims by directing that it consider the case and give judgment for the amount found to be due. Stripped of all complexities of detail the case is one in which, simply stated, petitioner has sought to enforce the obligation, which the Government has assumed, to pay him for work done and not paid for. Congress has in effect consented to judgment in an amount to be ascertained by reference to the specified data.

When a plaintiff brings suit to enforce a legal obligation it is not any the less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable. Nor is it any the less so because the amount recoverable depends upon a mathematical computation based upon data to be ascertained which by the terms of the obligation are its measure. For in any case the court is called on to sanction, by its judgment, an alleged obligation in a proceeding in which the existence, validity and extent of the obligation, the existence of the data, and the correctness of the computation may be put in issue.

The court below seems to have assumed that its only function under the Special Act was to make a calculation based upon data to be found in the Act and in the findings of the earlier suit. In view of the provisions of the Special Act for taking evidence and for considering the evidence in the first suit, we cannot say that all the earlier findings are to be deemed conclusive and that the court could not have been called on in this proceeding to determine judicially whether they are so. Whether the Act makes them conclusive, and if not, whether the evidence would establish the facts on which the Act predicates liability, are judicial questions. But if the facts be ascertained by proof or by stipulation, it is still a part of the judicial function to determine whether there is a legally binding obligation and, if so, to give judgment for the amount due even though the amount depends upon mere computation. \* \* \*

We conclude that the effect of the Special Act was to authorize petitioner to invoke the judicial power of the Court of Claims, and that he has done so. It is true that Congress has imposed on that court, as it has on the courts of the District of Columbia, nonjudicial duties of an administrative or legislative character.

See *In re Sanborn*, *supra*; *Federal Radio Comm'n v. Nelson Co.*, 289 U.S. 266, 275, 53 S.Ct. 627, 632, 77 L.Ed. 1166, 89 A.L.R. 406. Those imposed on the Court of Claims are such as it has traditionally exercised ever since its original organization as a mere agency of Congress to aid it in the performance of its constitutional duty to provide for payment of the debts of the Government. Such administrative duties coexist with its judicial functions. See *Ex parte Bakelite Corp'n*, *supra*, 279 U.S. 452 et seq., 49 S.Ct. 413, 73 L.Ed. 789. Its decisions rendered in its administrative capacity are not judicial acts, and their review, even though sanctioned by Congress, is not within the appellate jurisdiction of this Court. *Gordon v. United States*, 2 Wall. 561, 17 L.Ed. 921; and see the views expressed by Taney, C. J., in 117 U.S. 697; *In re Sanborn*, *supra*. But notwithstanding the retention of such administrative duties by the Court of Claims, as in the case of the courts of the District of Columbia, Congress has provided for appellate review of the judgments of both courts rendered in their judicial capacity. And this Court has held by an unbroken line of decisions, that its appellate jurisdiction, conferred by Art. III, Sec. 2, Cl. 2 of the Constitution, extends to the review of such judgments of the Court of Claims; *De Groot v. United States*, 5 Wall. 419, 18 L.Ed. 700; *United States v. Jones*, *supra*; *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 263, 53 S.Ct. 345, 348, 77 L.Ed. 730, 87 A.L.R. 1191; and of the courts of the District of Columbia; *Federal Radio Comm'n v. Nelson Bros. Co.*, *supra*, and cases cited.

\* \* \*

The Court of Claims' determination that the Special Act conferred upon it only non-judicial functions and hence that it had no judicial duty to perform was itself an exercise of judicial power reviewable here. *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047. The case is not one where the court below has made merely an administrative decision not subject to judicial review, without purporting to act judicially or to rule as to the extent of its judicial authority as the ground of its action or refusal to act. \* \* \* Jurisdiction to decide is jurisdiction to make a wrong as well as a right decision. \* \* \*

Reversed.

#### NOTE

1. State decisions have held the principle of the separation of powers to invalidate legislation awarding new trials in specific cases, *Merrill v. Sherburne*, 1 N.H. 199 (1818), *De Chastellux v. Fairchild*, 15 Pa.St. 18, 53 Am.Dec. 570 (1850); setting aside judgments already rendered, *Taylor v. Place*, 4 R.I. 324 (1856); and granting rehearings after a case has been heard and decided on its merits, *In re Sibley*, 148 Minn. 347, 182 N.W. 168 (1921).

2. Courts refuse to give retrospective operation to legislative interpretations of unambiguous statutes; *In re Handley's Estate*, 15 Utah 212, 49 P. 829 (1897); *California Employment Stabilization Commission v. Payne*, — Cal.2d —, 187 P.2d 702 (1947).

3. For an extended discussion of judicial control over the admission and disbarment of attorneys, see *In re Cannon*, 206 Wis. 374, 240 N.W. 441 (1932). See B. Lee, *Constitutional Power of Courts over Admission to the Bar*, 13 Harv.L.Rev. 233 (1900); D. Shanfeld, *The Scope of Judicial Independence of the Legislature in Matters of Procedure and Control of the Bar*, 19 St.L.L.Rev. 163 (1934).

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### ATCHISON, T. & S. F. RY. CO. v. LONG.

Supreme Court of Oklahoma, 1926. 122 Okl. 86, 251 P. 486.

Action by the Atchison, Topeka & Santa Fé Railway Company against Ora Long, County Assessor, and Paul Prince, County Treasurer, of Lincoln County, for an injunction. Judgment for defendants, and plaintiff appeals. Affirmed.

PHELPS, J. \* \* \*

The sole question presented by the appeal is whether the act, and particularly section 3 thereof, is in conflict with the provisions of the Constitution of Oklahoma. The act, having been initiated and enacted by a vote of the people, stands, so far as the questions presented here are concerned, in the same position it would have stood in if it had been a measure enacted by the Legislature.

It is urged that the act is void as being violative of section 1, art. 4, of the Constitution of Oklahoma, providing that:

"The powers of the government of the state of Oklahoma shall be divided into three separate departments: The legislative, executive, and judicial; and except as provided in this Constitution, the legislative, executive, and judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others."

The law is well settled that the powers and functions of the three several co-ordinate branches of the state government must be and forever remain separate and distinct, each one designed for a separate purpose and each functioning in its own sphere, and we are in thorough accord with the sentiment expressed by this court in *Re County Commissioners*, 22 Okl. 435, 98 P. 557, wherein it, speaking through Mr. Justice Williams, said:

"The distribution of the powers of government into three separate departments, legislative, executive, and judicial, is the basic principle of our constitutional system."

In that opinion we also find a quotation from Webster's Works,

vol. 3, p. 29, wherein that eminent authority said:

"It cannot be denied that one great object of written Constitutions is to keep the departments of government as distinct as possible; and for this purpose it imposes restraints designed to have that effect."

In that case this court had under consideration an act of the Legislature attempting to confer upon this court the power and authority, in a certain judicial district, where, in the judgment of this court, the necessity existed, to recommend to the Governor that an additional district judge be appointed by him for such length of time as in the judgment of the Supreme Court might be necessary for a proper disposition of the business, and it was there held that the act attempted to delegate to the judicial branch of the government powers vested exclusively by the Constitution in the legislative branch of the government.

If it can be said that the act in question, by its provisions, in any manner limits or restricts the judicial arm of the government in properly exercising its discretion in discharging the duties imposed upon it by the Constitution, it is void and must fall, and a mere glance at section 3, *supra*, of the measure is sufficient to convince one that its provisions are an impingement upon the above-quoted section of the Constitution.

In *Riglander v. Star Co.*, 98 App.Div. 101, 90 N.Y.S. 772, affirmed by the Court of Appeals of New York, 181 N.Y. 531, 73 N.E. 1131, this question was so thoroughly and ably treated there that we are inclined to adopt both the reasoning and language as being potentially applicable here. It appears that the Legislature had enacted a statute providing that certain courts in the state of New York should give preference in the trial of certain cases, and when the courts held that the provisions of the act were not mandatory, but discretionary, the Legislature sought to strengthen the law by an amendment providing that:

"The court or justice must designate a day certain, during that term, on which day the said cause shall then be heard; if there be two or more causes so designated for trial for the same day, the said causes shall be heard in the order of their date of issue." Code Civ.Proc.N.Y. § 793.

And the court there held that, inasmuch as the Legislature attempted to strip the courts of those discretionary powers that courts have exercised since their organization, that it was violative of the Constitution providing for the separation of the three branches of the government.

Section 3 of the act before us provides that an injunction action may be brought; that the defendant must answer within 10 days, "and the district court shall try the case within ten days thereafter, which trial may be had in chambers if the court be

not then in session, and in any county in the judicial district, and upon a trial the court shall render judgment. \* \* \* It further provides that an appeal may be taken to the Supreme Court within ten days from the date of judgment "and not thereafter, except for good cause shown the trial court may extend this time for a period not to exceed twenty days, and the Supreme Court shall determine the appeal at the earliest possible moment."

Then, the question here is, can the courts be stripped of their discretionary powers guaranteed to them under the Constitution, by the legislative branch of the government, which, in this instance, is a vote of the people instead of an enactment of the Legislature? No one will deny that the legislative arm of the government has the power to alter and regulate the procedure in both law and equity matters, but for it to attempt to compel the courts to give a hearing to a particular litigant at a particular time, to the absolute exclusion of others who may have an equal claim upon its attention, strikes a blow at the very foundation of constitutional government. The right to control its order of business and to so conduct the same that the rights of all litigants may properly be safeguarded has always been recognized as inherent in courts, and to strip them of that authority would necessarily render them so impotent and useless as to leave little excuse for their existence and place in the hands of the legislative branch of the state power and control never contemplated by the Constitution.

It takes no great exercise of the imagination to contemplate a condition arising wherein it would be impossible for the district court to try a particular case within ten days after defendant had filed his answer, but that one or the other of the litigants would be entitled to a continuance, but under the provisions of this act, however meritorious an application for a continuance might be, it must be denied, and it is violative of the principles of constitutional government and repugnant to every sense of justice to say that the court shall require one litigant to go to trial within a specified time under the provisions of this act, where under the exact circumstances it would be reversible error to require another litigant to go to trial, and yet this is the practical effect of the provisions of the act before us.

The Supreme Court of the state of Ohio had this same question before it in *Schario v. State*, 105 Ohio St. 535, 138 N.E. 63. In that case it appears the Legislature had enacted a law requiring that when petition in error was filed in a certain class of cases they should be heard by the reviewing court "within not more than thirty court days after filing such petition in error." And in holding that the act was an invasion of the judicial powers of the state, the court used logic and language which so

completely meets with our approval that we quote therefrom as follows:

"We come now to the major question directly involved under the statute, whether or not under our Constitution the legislative branch of the government had any right to limit the judicial branch of the government in respect to its hearing and determination of the various actions and proceedings within the court's jurisdiction. True, the general subject-matter of procedure by the parties to the cause, prescribing the manner of invoking the jurisdiction, the pleadings, and the time within which the jurisdiction shall be invoked, in short, the adjective law of a case, has always been regarded within the proper province of legislative action, yet the legislative branch of the government is without constitutional authority to limit the judicial branch of the government in respect to when it shall hear or determine any cause of action within its lawful jurisdiction.

"Whether or not justice is administered without 'denial or delay' is a matter for which the judges are answerable to the people, and not to the General Assembly of Ohio. Manifestly, when a case can be heard and determined by a court must necessarily depend very largely upon the court docket, the quantity of business submitted to the court, the nature, the importance, and the difficulties attending the just and legal solution of matters involved. It would be obviously unfair to the court, as well as unfair to other parties likewise interested in the early and expeditious determination of their causes, to require a court to suspend or delay equally important matters theretofore submitted to the court for its consideration and determination in order to give preference to the hearing and determination of some particular case or character of cases. At least that is a matter that should be most properly and wisely left to the sound discretion of the court.

"We hold, therefore, that a provision of law mandatory in its terms, intention, and character, requiring the court in the exercise of a jurisdiction duly conferred upon it to hear or determine a cause within 30 days from the time within which it is filed in court, or submitted to the court, is an unreasonable and unconstitutional invasion of judicial power, and therefore void. The general principle is sustained in *City of Zanesville v. Zanesville Telegraph & Telephone Co.*, 64 Ohio St. 67, 59 N.E. 781, 52 L.R.A. 150, 83 Am.St.Rep. 725, and *Incorporated Village of Fairview v. Giffie*, 73 Ohio St. 183, 76 N.E. 865." \* \* \*

We reach the conclusion, therefore, that for the reasons herein given, that section 3 of the initiated measure is in direct conflict with the provisions of the Constitution, and, for that reason, void, and, having reached that conclusion, the inquiry naturally

arises, if section 3 is stricken down, what effect will that have upon sections 1, 2, 4, and 5, and a careful examination of the whole act readily forces us to the inevitable conclusion that, with section 3 eliminated, paraphrasing the language of a former distinguished member of this court, the remaining sections would be dead limbs upon the legislative tree. Section 3 is that part of the measure intended to motivate the whole measure, without which the act would be as useless as an automobile with the motor removed, standing as a useless piece of machinery, or like the human body with the heart removed, the remaining parts being wholly incapable of functioning.

However great may be the demand or necessity therefor, however ardently we may wish to see laws enacted which will facilitate the assessment and collection of taxes, we cannot uphold this measure without doing violence to fundamental, well-recognized and long-established rules of law.

The judgment of the district court is therefore affirmed.

#### NOTE

1. Courts have frequently considered, and often invalidated, legislative attempts to control their exercise of their judicial functions. The following cases involve various attempts at such legislative control; *People v. McMurchy*, 249 Mich. 147, 228 N.W. 723 (1930); *Zimmerman v. C. & N. W. Ry. Co.*, 129 Minn. 4, 151 N.W. 412 (1915); *Farmer v. Christian*, 154 Va. 48, 152 S.E. 382 (1930); *State ex rel. Beach v. Judicial District Court*, 53 Nev. 444, 5 P.2d 535 (1931); *Schario v. State*, 105 Ohio St. 535, 138 N.E. 63 (1922); *State ex rel. Kostas v. Johnson, Judge*, 224 Ind. 540, 69 N.E.2d 592, 168 A.L.R. 1118 (1946).

2. For discussion of legislative and judicial control over rules of pleading, practice and procedure in judicial proceedings, see *In re Constitutionality of Statute Empowering Supreme Court to Promulgate Rules Regulating Pleading, Practice and Procedure in Judicial Proceedings*, 204 Wis. 501, 236 N.W. 717 (1931); *State v. Roy*, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936). See *R. Pound, The Rule Making Power of the Courts*, 12 *Am.Bar Ass'n Jour.* 599 (1926).

3. Note, *How Far May Legislatures Regulate Judicial Procedure?* 34 *Harv.L.Rev.* 424 (1921).

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#### MICHAELSON v. UNITED STATES ex rel. CHICAGO, ST. P. M. & O. R. CO.

Supreme Court of the United States, 1924. 266 U.S. 42, 45 S.Ct. 18,  
69 L.Ed. 162, 35 A.L.R. 451.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

These cases were argued together and will be disposed of in one opinion. The principal question presented in the Michaelson

Case, and the sole question in the Sandefur Case, is whether the provision of the Clayton Act of October 15, 1914, c. 323, 38 Stat. 738, §§ 21, 22 [28 U.S.C.A. §§ 386, 387], requiring a jury trial in certain specified kinds of contempt is constitutional. Subordinate questions presented in the Michaelson Case are: (a) Whether petitioners were, or whether it is necessary that they should be, "employees" within the meaning of section 20 of the act [29 U.S.C.A. § 52]; (b) whether the acts alleged to constitute the contempt were also criminal offenses under the statutes of the United States or of the state where committed; (c) whether the provision for a jury is mandatory or permissive.

The petitioners in the Michaelson Case were striking employees of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and, with others, were proceeded against by bill in equity for combining and conspiring to interfere with interstate commerce by picketing and the use of force and violence, etc. After a hearing, a preliminary injunction was granted. Subsequently proceedings in contempt were instituted in the District Court, charging petitioners with sundry violations of the injunction, and a rule to show cause was issued. Upon the answer and return to the rule, petitioners applied for a jury trial under section 22 of the Clayton Act; but the District Court denied the application and proceeded without a jury. At the conclusion of the hearing, the petitioners were adjudged guilty and sentenced to pay fines in various sums, and in default of payment to stand committed to jail until such fines were paid. Thereupon the case was taken to the Circuit Court of Appeals by writ of error, and by that court the judgments were affirmed. 291 F. 940.

First. Is the provision of the Clayton Act, granting a right of trial by jury, constitutional? The court below held in the negative on the ground that the power of a court to vindicate or enforce its decree in equity is inherent, is derived from the Constitution as a part of its judicial power, and that Congress is without constitutional authority to deprive the parties in an equity court of the right of trial by the chancellor.

If the statute now under review encroaches upon the equity jurisdiction intended by the Constitution, a grave constitutional question in respect of its validity would be presented; and it therefore becomes our duty, as this court has frequently said, to construe it, "if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748.

Shortly stated, the statute provides that willful disobedience of any lawful writ, process, order, rule, decree, or command of any District Court of the United States or any court of the Dis-

trict of Columbia by doing any act or thing forbidden, if such act or thing be of such character as to constitute also a criminal offense under any statute of the United States or law of any state in which the act is committed, shall be proceeded against as in the statute provided. In all such cases the "trial may be by the court, or, upon demand of the accused, by a jury" and "such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information." Upon conviction the accused is to be punished "by fine or imprisonment, or both," the fine to be "paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct."

The provision for trial by jury upon demand, as we shall presently show, is mandatory, and the question to be answered is whether it infringes any power of the courts vested by the Constitution and unalterable by congressional legislation. We first inquire whether the proceeding contemplated by the statute is for a civil or a criminal contempt. If it be the latter—since the proceeding for criminal contempt, unlike that for civil contempt, is between the public and the defendant, is an independent proceeding at law, and no part of the original cause (*Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444-446, 451, 31 S.Ct. 492, 55 L.Ed. 797, 34 L.R.A.,N.S., 874)—we are at once relieved of the doubt which might otherwise arise in respect of the authority of Congress to set aside the settled rule that a suit in equity is to be tried by the chancellor without a jury unless he choose to call one as purely advisory. We think the statute, reasonably construed, relates exclusively to criminal contempts. The act or thing charged must be of such character as also to constitute a crime. Prosecution must be in conformity with the practice in criminal cases. Upon conviction the accused is to be punished by fine or imprisonment, or both. True, the fine may be paid to the United States or to the complainant or divided among the parties injured by the act, as the court may direct; but that does not alter the essential nature of the proceeding contemplated by the statute. The discretion given the court in this respect is incidental and subordinate to the dominating purpose of the proceeding which is punitive to vindicate the authority of the court and punish the act of disobedience as a public wrong. See *Re Merchants Stock Co.*, Petitioner, 223 U.S. 639, 641, 32 S.Ct. 339, 56 L.Ed. 584; *Matter of Christenson Engineering Co.*, 194 U.S. 458, 461, 24 S.Ct. 729, 48 L.Ed. 1072; *Merchants' Stock & Grain Co. v. Board of Trade*, 187 F. 398, 401, 109 C.C.A. 230; *Kreplik v. Couch Patents Co.*, 190 F. 565, 572, 111 C.C.A. 381. "If the contempt savors of criminality, and the sentence is penal,

that according to the books appears to be enough." Long Wellesley's Case, 2 Russ. & M. 639, 667.

But it is contended that the statute materially interferes with the inherent power of the courts and is therefore invalid. That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress (*Ex parte Robinson*, 19 Wall. 505, 510, 511, 22 L.Ed. 205; *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 326, 24 S.Ct. 665, 48 L.Ed. 997); but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted. The statute now under review is of the latter character. It is of narrow scope, dealing with the single class where the act or thing constituting the contempt is also a crime in the ordinary sense. It does not interfere with the power to deal summarily with contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, and is in express terms carefully limited to the cases of contempt specifically defined. Neither do we think it purports to reach cases of failure or refusal to comply affirmatively with a decree—that is to do something which a decree commands—which may be enforced by coercive means or remedied by purely compensatory relief. If the reach of the statute had extended to the cases which are excluded a different and more serious question would arise. But the simple question presented is whether Congress may require a trial by jury upon the demand of the accused in an independent proceeding at law for a criminal contempt which is also a crime. In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a witness against himself, *Gompers v. Buck's Stove & Range Co.*, *supra*, page 444, 31 S.Ct. 492. The fundamental characteristics of both are the same. Contempts of the kind within the terms of the statute partake of the nature of crimes in all essential particulars. "So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society (N.S.) p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way." *Gompers v. United States*, 233 U.S. 604, 610, 611, 34 S.Ct. 693, 58 L.Ed. 1115, Ann.Cas.1915D, 1044. This is also pointed out by

counsel in the case of *O'Shea v. O'Shea and Parnell*, L.R. 15 Prob. Div. 50, 61; and, in the course of one of the opinions in that case, it is said (page 64):

"The offense of appellant [criminal contempt] is certainly a criminal offense. I do not say that it is an indictable offense, but, whether indictable or not, it is a criminal offense, and it is an offense, and the only offense that I know of, which is punishable at common law by summary process."

The proceeding is not between the parties to the original suit but between the public and the defendant. The only substantial difference between such a proceeding as we have here, and a criminal prosecution by indictment or information is that in the latter the act complained of is the violation of a law and in the former the violation of a decree. In the case of the latter, the accused has a constitutional right of trial by jury; while in the former he has not. The statutory extension of this constitutional right to a class of contempts which are properly described as "criminal offenses" does not, in our opinion, invade the powers of the courts as intended by the Constitution or violate that instrument in any other way. \* \* \*

The *Sandefur* Case is here on certificate requesting the instruction of this court upon the following question of law:

"Do those provisions of section 22 of the Clayton Act which require a conviction upon a jury trial as a condition precedent to punishment for contempt, upon demand for a jury trial in the case specified, impose a valid restriction upon the inherent judicial power of the United States District Courts?"

The facts stated in the certificate bring the case within the principle of what has already been said, and the question must be answered in the affirmative.

No. 246 reversed and remanded to the District Court for further proceedings in conformity with this opinion.

No. 232, answer: Yes.

#### NOTE

1. There are several state decisions contra to the reported case: *Carter v. Commonwealth*, 96 Va. 791, 32 S.E. 780, 45 L.R.A. 310 (1899); *Fort v. Co-op. Farmers' Exchange, Inc.*, 81 Colo. 431, 256 P. 319 (1927). But see *Ex parte Creasy*, 243 Mo. 679, 148 S.W. 914 (1912), sustaining legislation fixing maximum punishments in cases of constructive contempts of court. See F. Frankfurter and J. M. Landis, *Power of Congress over Procedure in Criminal Contempt in Inferior Federal Courts*, 37 Harv.L.Rev. 1010 (1924).

2. A state court's exercise of its power to adjudge persons in contempt of court for criticizing it is limited by the protection of freedom of speech based on the due process clause of Const.U.S. Amend. 14, § 1; see *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941).

3. Congressional control over the jurisdiction of inferior federal courts has been made the basis for sustaining legislation limiting their power to issue injunctions in labor disputes, *Levering & Garriques Co. v. Morrin*, 71 F.2d 284 (C.C.A.N.Y.1934), certiorari denied, 293 U.S. 595, 55 S.Ct. 110, 79 L.Ed. 688 (1934).

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### AETNA LIFE INS. CO. OF HARTFORD v. HAWORTH.

Supreme Court of the United States, 1937. 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617.

Mr. Chief Justice HUGHES delivered the opinion of the Court. The question presented is whether the District Court had jurisdiction of this suit under the Federal Declaratory Judgment Act. Act of June 14, 1934, 48 Stat. 955, Jud.Code § 274d, 28 U.S.C. § 400 (28 U.S.C.A. § 400 and note).

The question arises upon the plaintiff's complaint which was dismissed by the District Court upon the ground that it did not set forth a "controversy" in the constitutional sense and hence did not come within the legitimate scope of the statute. 11 F. Supp. 1016. The decree of dismissal was affirmed by the Circuit Court of Appeals. 84 F.2d 695. We granted certiorari. November 16, 1936. 299 U.S. 536, 57 S.Ct. 190, 81 L.Ed. 395.

From the complaint it appears that plaintiff is an insurance company which had issued to the defendant Edwin P. Haworth five policies of insurance upon his life, the defendant Cora M. Haworth being named as beneficiary. The complaint set forth the terms of the policies. They contained various provisions which for the present purpose it is unnecessary fully to particularize. It is sufficient to observe that they all provided for certain benefits in the event that the insured became totally and permanently disabled. In one policy, for \$10,000, issued in 1911, the company agreed, upon receiving the requisite proof of such disability and without further payment of premiums, to pay the sum insured, and dividend additions, in twenty annual installments, or a life annuity as specified, in full settlement. In four other policies issued in 1921, 1928, and 1929, respectively, for amounts aggregating \$30,000, plaintiff agreed upon proof of such disability to waive further payment of premiums, promising in one of the policies to pay a specified amount monthly and in the other three to continue the life insurance in force. By these four policies the benefits to be payable at death, and the cash and loan values to be available, were to be the same whether the premiums were paid or were waived by reason of the described disability.

The complaint alleges that in 1930 and 1931 the insured ceased

to pay premiums on the four policies last mentioned and claimed the disability benefits as stipulated. He continued to pay premiums on the first mentioned policy until 1934 and then claimed disability benefits. These claims, which were repeatedly renewed, were presented in the form of affidavits accompanied by certificates of physicians. A typical written claim on the four policies is annexed to the complaint. It states that while these policies were in force, the insured became totally and permanently disabled by disease and was "prevented from performing any work or conducting any business for compensation or profit"; that on October 7, 1930, he had made and delivered to the company a sworn statement "for the purpose of asserting and claiming his right to have these policies continued under the permanent and total disability provision contained in each of them"; that more than six months before that date he had become totally and permanently disabled and had furnished evidence of his disability within the stated time; that the annual premiums payable in the year 1930 or in subsequent years were waived by reason of the disability; and that he was entitled to have the policies continued in force without the payment of premiums so long as the disability should continue.

With respect to the policy first mentioned, it appears that the insured claimed that prior to June 1, 1934, when he ceased to pay premiums, he had become totally and permanently disabled; that he was without obligation to pay further premiums and was entitled to the stipulated disability benefits including the continued life of the policy.

Plaintiff alleges that consistently and at all times it has refused to recognize these claims of the insured and has insisted that all the policies had lapsed according to their terms by reason of the non-payment of premiums, the insured not being totally and permanently disabled at any of the times to which his claims referred. Plaintiff further states that taking loans into consideration four of the policies have no value and the remaining policy (the one first mentioned) has a value of only \$45 as extended insurance. If, however, the insured has been totally and permanently disabled as he claims, the five policies are in full force, the plaintiff is now obliged to pay the accrued installments of cash disability benefits for which two of the policies provide, and the insured has the right to claim at any time cash surrender values accumulating by reason of the provisions for waiver of premiums, or at his death, Cora M. Haworth, as beneficiary, will be entitled to receive the face of the policies less the loans thereon.

Plaintiff thus contends that there is an actual controversy with defendants as to the existence of the total and permanent dis-

ability of the insured and as to the continuance of the obligations asserted despite the nonpayment of premiums. Defendants have not instituted any action wherein the plaintiff would have an opportunity to prove the absence of the alleged disability and plaintiff points to the danger that it may lose the benefit of evidence through disappearance, illness, or death of witnesses; and meanwhile, in the absence of a judicial decision with respect to the alleged disability, the plaintiff in relation to these policies will be compelled to maintain reserves in excess of \$20,000.

The complaint asks for a decree that the four policies be declared to be null and void by reason of lapse for nonpayment of premiums and that the obligation upon the remaining policy be held to consist solely in the duty to pay the sum of \$45 upon the death of the insured, and for such further relief as the exigencies of the case may require.

First.—The Constitution (article 3, § 2) limits the exercise of the judicial power to “cases” and “controversies.” “The term ‘controversies,’ if distinguishable at all from ‘cases,’ is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.” Per Mr. Justice Field in *Re Pacific Railway Commission, C.C.*, 32 F. 241, 255, citing *Chisholm v. Georgia*, 2 Dall. 419, 431, 432, 1 L.Ed. 440. See *Muskrat v. United States*, 219 U.S. 346, 356, 357, 31 S.Ct. 250, 55 L.Ed. 246; *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 723, 724, 49 S.Ct. 499, 501, 502, 73 L.Ed. 918. The Declaratory Judgment Act of 1934, in its limitation to “cases of actual controversy,” manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word “actual” is one of emphasis rather than of definition. Thus the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. *Turner v. Bank of North America*, 4 Dall. 8, 10, 1 L.Ed. 718; *Stevenson v. Fain*, 195 U.S. 165, 167, 25 S.Ct. 6, 49 L. Ed. 142; *Kline v. Burke Construction Co.*, 260 U.S. 226, 234, 43 S.Ct. 79, 82, 67 L.Ed. 226, 24 A.L.R. 1077. Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. The judiciary clause of the Constitution “did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts.” *Nashville, Chattanooga & St. Louis R. Co. v. Wallace*, 288 U.S. 249, 264, 53 S.Ct. 345, 348, 77 L.Ed. 730, 87 A.L.R. 1191. In dealing with methods within its sphere of remedial action the

Congress may create and improve as well as abolish or restrict. The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.

A "controversy" in this sense must be one that is appropriate for judicial determination. *Osborn v. Bank of United States*, 9 Wheat. 738, 819, 6 L.Ed. 204. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. *United States v. Alaska S. S. Co.*, 253 U.S. 113, 116, 40 S.Ct. 448, 449, 64 L.Ed. 808. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *South Spring Gold Co. v. Amador Gold Co.*, 145 U.S. 300, 301, 12 S.Ct. 921, 36 L.Ed. 712; *Fairchild v. Hughes*, 258 U.S. 126, 129, 42 S.Ct. 274, 275, 66 L.Ed. 499; *Massachusetts v. Mellon*, 262 U.S. 447, 487, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. \* \* \* Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. \* \* \* And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required. *Nashville, Chattanooga & St. Louis R. Co. v. Wallace*, *supra*, 288 U.S. 249, at page 264, 53 S.Ct. 345, 348, 77 L.Ed. 730, 87 A.L.R. 1191.

With these principles governing the application of the Declaratory Judgment Act, we turn to the nature of the controversy, the relation and interests of the parties, and the relief sought in the instant case. \* \* \*

Our conclusion is that the complaint presented a controversy to which the judicial power extends and that authority to hear and determine it has been conferred upon the District Court by the Declaratory Judgment Act. The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

## NOTE

1. State decisions today uniformly sustain the validity of declaratory judgment acts which limit resort to such proceedings to cases of actual bona fide controversies; *Braman v. Babcock*, 98 Conn. 549, 120 A. 150 (1923); *Blakeslee v. Wilson*, 190 Cal. 479, 213 P. 495 (1923); *State ex rel. v. Grove*, 109 Kan. 619, 201 P. 82 (1921); *Petition of Kariher*, 284 Pa. 455, 131 A. 265 (1925). An early Michigan decision held such act invalid, *Anway v. Grand Rapids Ry. Co.*, 211 Mich. 592, 179 N.W. 350 (1920), but a later decision sustained such act, *Washington-Detroit Theatre Co. v. Moore*, 249 Mich. 673, 229 N.W. 618 (1930). See E. M. Borchard, *The Constitutionality of Declaratory Judgments*, 31 Col.L.Rev. 561 (1931).

2. A statute that imposes on a court the duty of deciding matters of legislative policy in reaching its decision in a case is held invalid as imposing non-judicial functions on it. The courts are not in accord as to when a statute has this effect. The issue arises frequently when courts are used in organizing or creating municipalities and districts for public or semi-public purposes; see *In re Incorporation of North Milwaukee*, 93 Wis. 616, 67 N.W. 1033 (1896); *Forsythe v. Hammond*, 68 F. 774 (C.C.Ind.1895); *Funkhouser v. Randolph*, 287 Ill. 94, 122 N.E. 144 (1919); *State ex rel. Bryant v. Akron Metropolitan Park District*, 120 Ohio St. 464, 166 N.E. 407 (1929); in the granting and revocation of licenses, *State v. Huber*, — W.Va. —, 40 S.E.2d 11, 168 A.L.R. 808 (1946); *Cromwell v. Jackson*, — Md. —, 52 A.2d 79 (1947); in the appointment of non-judicial officers, *State ex rel. Young v. Brill*, 100 Minn. 499, 111 N.W. 294, 639 (1907); *Fox v. McDonald*, 101 Ala. 51, 13 So. 416 (1893); and in reviewing the determinations of administrative boards, *Sterling Refining Co. v. Walker*, 165 Okl. 45, 25 P.2d 312 (1933); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 43 S. Ct. 445, 67 L.Ed. 731 (1923). See Note, *Delegation to Judicial Bodies of Power to Supervise Organization of Public Corporations*, 39 Yale L.Jour. 413 (1930); R. A. Brown, *Administrative Commissions and the Judicial Power*, 19 Minn.L.Rev. 261 (1935).

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PEOPLE v. SWENA.

Supreme Court of Colorado, 1931. 88 Colo. 337, 296 P. 271.

BUTLER, J. The Public Utilities Commission sued M. B. Swena to recover the amount of a fine imposed by it in a contempt proceeding. It is alleged in the complaint that the commission found that Swena was operating as a motor vehicle carrier without having obtained a certificate of public convenience and necessity, and ordered him to desist; that he violated such order and was adjudged by the commission to be in contempt; and that the commission fined him \$200 for such contempt. The trial court dismissed the case, holding that the power to punish for contempt is a judicial power not within the province of the Commission.

Section 2975, C. L., provides that every person who shall fail to obey an order of the commission, except an order for the payment of money, "shall be in contempt of the commission, and shall be punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record." It also provides: "The remedy prescribed in this action [section] shall not be a bar to or affect any other remedy prescribed in this act, but shall be cumulative and in addition to such other remedy or remedies." Section 2970, C. L., provides a penalty, not exceeding \$2,000, for a failure to obey an order of the commission, and declares that in case of a continuing violation of such order, "each day's continuance thereof shall be and be deemed to be a separate and distinct offense." Section 2974, C. L., provides that actions to recover "penalties" shall be brought in the district court in the name of the people of the state of Colorado, and that all "fines and penalties" recovered in any such action shall be paid into the state treasury to the credit of the Public Utility Commission fund.

Article 3 of the Colorado Constitution is as follows: "The powers of the government of this state are divided into three distinct departments,—the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." By section 1 of article 6 the judicial power of the state, "except as in the constitution otherwise provided," is vested in the courts. Section 12 of article 5 provides that each house of the General Assembly shall have power to punish its members or other persons for contempt in its presence, and to "enforce obedience to its process." In impeachment trials under article 13 the senate sits as a court and, of course, exercises judicial powers.

The Public Utilities Commission is not a court. *Public Utilities Commission v. Colorado Title & Trust Co.*, 65 Colo. 472, 178 P. 6; *Clark v. Public Utilities Commission*, 78 Colo. 48, 239 P. 20. It is charged with the performance of certain executive and administrative duties. In the performance thereof, and as incidental thereto, it hears evidence, ascertains facts, and exercises judgment and discretion; but this is the exercise of merely a quasi judicial function, not the exercise of judicial power within the meaning of the Constitution. *Public Utilities Commission v. Colorado Title & Trust Co.*, *supra*.

The power to punish for contempt is a judicial power within the meaning of the Constitution. It belongs exclusively to the courts, except in cases where the Constitution confers such power

upon some other body. *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 485, 155 U.S. 3, 14 S.Ct. 1125, 15 S.Ct. 19, 38 L.Ed. 1047, 39 L.Ed. 49; *Langenberg v. Decker*, 131 Ind. 471, 31 N.E. 190, 16 L.R.A. 108. The Constitution, as we have seen, confers that power in certain cases upon each house of the General Assembly. The Constitution of Oklahoma expressly confers upon the Corporation Commission the powers of courts of record, including the power to punish for contempt. Const. art. 9, § 19. Our Constitution confers no such power upon the Public Utilities Commission.

Delivering the opinion of the court in *Interstate Commerce Commission v. Brimson*, supra, Mr. Justice Harlan said (page 488 of 154 U.S., 14 S.Ct. 1125, 1137): "Of course, the question of punishing the defendants for contempt could not arise before the commission; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body." And again (page 485 of 154 U.S., 14 S.Ct. 1125, 1136): "Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment." With the views thus expressed we are in full accord.

In fining Swena for contempt, the commission acted without constitutional warrant.

Section 2975, C. L., attempting to confer upon the Commission the power to punish for contempt, is unconstitutional and therefore void.

The judgment is affirmed.

#### NOTE

1. For other cases accord see *Langenberg v. Decker*, 131 Ind. 471, 31 N.E. 190 (1892); *In re Sims*, 54 Kan. 1, 37 P. 135 (1894). For case contra, see *In re Hayes*, 200 N.C. 133, 156 S.E. 791 (1931). For method of obviating the inconveniences imposed by such cases upon administrative boards, see *Interstate Commerce Comm. v. Brimson*, 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047 (1894). See E. F. Albertsworth, *Administrative Contempt Powers: A Problem in Technique*, 25 *Am.Bar Ass'n Jour.* 955 (1939); K. C. Davis, *The Administrative Power of Investigation*, 56 *Yale L.Jour.* 1111 (1947).

2. A statute making the jury the judge of both law and fact in a criminal trial has been held invalid as conferring judicial power upon persons not members of the judicial department, *People v. Bruner*, 343 Ill. 146, 175 N.E. 400 (1931).

3. That a legislative limitation upon scope of judicial review of decisions of administrative bodies may result in invalidly conferring judicial power upon them, see *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932).

## STATE OF MISSISSIPPI v. JOHNSON.

Supreme Court of United States, 1867. 4 Wall. 475, 18 L.Ed. 437.

[Original proceeding to enjoin the enforcement in Mississippi of certain federal statutes providing for the government by military commanders under authority of Congress of certain of the Southern states lately in rebellion. President Johnson had vetoed them as unconstitutional, and they had been passed over his veto.]

Mr. Chief Justice CHASE. A motion was made, some days since, in behalf of the state of Mississippi, for leave to file a bill in the name of the state, praying this court perpetually to enjoin and restrain Andrew Johnson, President of the United States, and E. O. C. Ord, general commanding in the district of Mississippi and Arkansas, from executing, or in any manner carrying out, certain acts of Congress therein named. The acts referred to are those of March 2 and March 23, 1867, commonly known as the Reconstruction Acts. The Attorney General objected to the leave asked for, upon the ground that no bill which makes a President a defendant, and seeks an injunction against him to restrain the performance of his duties as President, should be allowed to be filed in this court. This point has been fully argued, and we will now dispose of it.

We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime. The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the state of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import. A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

The case of *Marbury v. Madison*, Secretary of State, 1 Cranch 137, 2 L.Ed. 60, furnishes an illustration. A citizen had been nominated, confirmed, and appointed a justice of the peace for

the District of Columbia, and his commission had been made out, signed, and sealed. Nothing remained to be done except delivery, and the duty of delivery was imposed by law on the Secretary of State. It was held that the performance of this duty might be enforced by mandamus issuing from a court having jurisdiction. So, in the case of *Kendall, Postmaster General, v. Stockton & Stokes*, 12 Pet. 527, 9 L.Ed. 1181, an act of Congress had directed the Postmaster General to credit Stockton & Stokes with such sums as the Solicitor of the Treasury should find due to them; and that officer refused to credit them with certain sums, so found due. It was held that the crediting of this money was a mere ministerial duty, the performance of which might be judicially enforced. In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by mandamus.

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander in chief. The duty thus imposed on the President is in no sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance." It is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it. Had it been supposed at the bar that this court would, in any case, interpose, by injunction, to prevent the execution of an unconstitutional act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it. Occasions have not been wanting. The constitutionality of the act for the annexation of Texas was vehe-

mently denied. It made important and permanent changes in the relative importance of states and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular states. But no one seems to have thought of an application for an injunction against the execution of the act by the President. And yet it is difficult to perceive upon what principle the application now before us can be allowed and similar applications in that and other cases have been denied. The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that Congress can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President? The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences. Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience; it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court? These questions answer themselves.

It is true that a state may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.

It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as

President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a state.

Motion denied.

#### NOTE

1. See also *Winsor v. Hunt*, 29 Ariz. 504, 243 P. 407 (1926). See *Myers, Mandamus Against a Governor*, 3 Mich.L.Rev. 631 (1905); *H. F. Kumm, Mandamus to the Governor in Minnesota*, 9 Minn.L. Rev. 21 (1924).

2. For discussion of the doctrine of "political questions" as a basis for judicial self-limitation, see *Colgrove v. Green*, supra, p. 40. See *O. P. Field, The Doctrine of Political Questions in the Federal Courts*, 8 Minn.L.Rev. 485 (1924).

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#### Ex parte GROSSMAN.

Supreme Court of the United States, 1925. 267 U.S. 87, 45 S.Ct. 332,  
69 L.Ed. 527, 38 A.L.R. 131.

Mr. Chief Justice TAFT. This is an original petition in this court for a writ of habeas corpus by Philip Grossman against Ritchie V. Graham, Superintendent of the Chicago House of Correction, Cook County, Ill. The defendant has answered the rule to show cause. The facts are not in dispute.

On November 24, 1920, the United States filed a bill in equity against Philip Grossman in the District Court of the United States for the Northern District of Illinois, under section 22 of the National Prohibition Act, 41 Stat. 305, 314, c. 85, 27 U.S.C.A. § 34, averring that Grossman was maintaining a nuisance at his place of business in Chicago by sales of liquor in violation of the act and asking an injunction to abate the same. Two days later the District Judge granted a temporary order. January 11, 1921, an information was filed against Grossman, charging that after the restraining order had been served on him, he had sold to several persons liquor to be drunk on his premises. He was arrested, tried, found guilty of contempt and sentenced to imprisonment in the Chicago House of Correction for one year and to pay a fine of \$1,000 to the United States and costs. The decree was affirmed by the Circuit Court of Appeals, *Grossman v. United States*, 280 F. 683. In December, 1923, the President

issued a pardon in which he commuted the sentence of Grossman to the fine of \$1,000 on condition that the fine be paid. The pardon was accepted, the fine was paid and the defendant was released. In May, 1924, however, the District Court committed Grossman to the Chicago House of Correction to serve the sentence notwithstanding the pardon. *United States v. Grossman*, 1 F.2d 941. The only question raised by the pleadings herein is that of the power of the President to grant the pardon. \* \* \*

The argument for the defendant is that the President's power extends only to offenses against the United States and a contempt of court is not such an offense, that offenses against the United States are not common-law offenses but can only be created by legislative act, that the President's pardoning power is more limited than that of the King of England at common law, which was a broad prerogative and included contempts against his courts chiefly because the judges thereof were his agents and acted in his name, that the context of the Constitution shows that the word "offenses" is used in that instrument only to include crimes and misdemeanors triable by jury and not contempts of the dignity and authority of the federal courts, and that to construe the pardon clause to include contempts of court would be to violate the fundamental principle of the Constitution in the division of powers between the legislative, executive and judicial branches, and to take from the federal courts their independence and the essential means of protecting their dignity and authority.

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Convention of the Thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

In a case presenting the question whether a pardon should be pleaded in bar to be effective, Chief Justice Marshall said of the power of pardon (*United States v. Wilson*, 7 Pet. 150, 160, 8 L. Ed. 640): "As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation

and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

In *Ex parte William Wells*, 18 How. 307, 311, 15 L.Ed. 421, the question was whether the President under his power to pardon could commute a death sentence to life imprisonment by granting a pardon of the capital punishment on condition that the convict be imprisoned during his natural life. This court, speaking through Mr. Justice Wayne, after quoting the above language of the Chief Justice said: "We still think so, and that the language used in the Constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain, that power had been exercised by the king, as chief executive. Prior to the revolution, the colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. They were, of course, to be applied as occasions occurred, and they constitute a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the Constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the Convention which framed the Constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment."

The king of England before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crimes and misdemeanors and as he has done to the present day. In the mind of a common-law lawyer of the eighteenth century the word "pardon" included within its scope the ending by the king's grace of the punishment of such derelictions, whether it was imposed by the court without a jury or upon indictment, for both forms of trial for contempts were had. *Thomas of Chartham v. Benet of Stamford* [1313] 24 *Selden Society*, 185; *Fulwood v. Fulwood* [1585] *Toothill*, 46; *Rex v. Buckenham* [1665] 1 *Keble*, 751, 787, 852; *Anonymous* [1674] *Cases in Chancery*, 238; *King and Codrington v. Rodman* [1630] *Cro. Car.* 198; *Bartram v. Dannett* [1676] *Finch*, 253; *Phipps v. Earl of Angelsea* [1721] 1 *Peere Williams*, 696.

These cases also show that long before our Constitution, a distinction had been recognized at common law between the

effect of the king's pardon to wipe out the effect of a sentence for contempt in so far as it had been imposed to punish the contemnor for violating the dignity of the court and the king, in the public interest and its inefficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor. IV Blackstone, 285, 397, 398; Hawkins, Pleas of the Crown (6th Ed. 1787) vol. 2, 553. The same distinction, nowadays referred to as the difference between civil and criminal contempts, is still maintained in English law. In the Matter of a Special Reference from Bahama Islands [1893] Appeal Cases, 138; Wellesley v. Duke of Beaufort, 2 Russell & Mylne, 639, 667 (where it is shown in the effect of a privilege from arrest of members of Parliament analogous in its operation to a pardon); In re Freston, 11 Q. B. D. 545, 552; Queen v. Barnardo, 23 Q.B.D. 305; O'Shea v. O'Shea and Parnell, 15 P. & D. 59, 62, 63, 65; Lord Chancellor Selborne in the House of Lords, 276 Hansard, 1714, commenting on Greene's Case, 6 Appeal Cases, 657.

In our own law the same distinction clearly appears. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797, 34 L.R.A.,N.S., 874; *Doyle v. London Guarantee Co.*, 204 U.S. 599, 607, 27 S.Ct. 313, 51 L.Ed. 641; *Bessette v. Conkey Co.*, 194 U.S. 324, 24 S.Ct. 665, 48 L.Ed. 997; *Alexander v. United States*, 201 U.S. 117, 26 S.Ct. 356, 50 L.Ed. 686; *Union Tool Co. v. Wilson*, 259 U.S. 107, 109, 42 S.Ct. 427, 66 L.Ed. 848. In the *Gompers Case* this court points out that it is not the fact of punishment but rather its character and purpose that makes the difference between the two kinds of contempts. For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it. For criminal contempts the sentence is punitive in the public interest to vindicate the authority of the Court and to deter other like derelictions.

With this authoritative background of the common law and English history before the American Revolution to show that criminal contempts were within the understood scope of the pardoning power of the executive, we come now to the history of the clause in the Constitutional Convention of 1787. The proceedings of the Convention from June 19, 1787, to July 23d, were by resolution referred to a Committee on Detail for report of the Constitution (II Farrand's Records of Constitutional Convention, 128, 129) and contained the following (II Farrand, 146): "The power of pardoning vested in the executive (which) his pardon shall not, however, be pleadable to an impeachment." On August 6th, Mr. Rutledge of the Committee on Detail (II Farrand, 185) reported the provision as follows: "He shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of impeachment." This is exactly what the king's

pardon was at common law with the same limitation. IV Blackstone, 399. On August 25th (II Farrand, 411), the words "except in cases of impeachment" were added after "pardons" and the succeeding words were stricken out. On Saturday, September 8th (II Farrand, 547), a committee of five to revise the style of and arrange the articles was agreed to by the House. As referred to the Committee on Style, the clause read (II Farrand, 575): "He shall have power to grant reprieves and pardons except in cases of impeachment." The Committee on Style reported this clause as it now is: "And he shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment." There seems to have been no discussion over the substance of the clause except that a motion to except cases of treason was referred to the Committee on Style, September 10th (II Farrand, 564), was not approved by the Committee and after discussion was defeated in the Convention September 15th (II Farrand, 626, 627).

We have given the history of the clause to show that the words "for offenses against the United States" were inserted by a Committee on Style, presumably to make clear that the pardon of the President was to operate upon offenses against the United States as distinguished from offenses against the states. It cannot be supposed that the Committee on Revision by adding these words, or the Convention by accepting them, intended *sub silentio* to narrow the scope of a pardon from one at common law or to confer any different power in this regard on our executive from that which the members of the Convention had seen exercised before the Revolution.

Nor is there any substance in the contention that there is any substantial difference in this matter between the executive power of pardon in our government and the king's prerogative. The courts of Great Britain were called the king's courts, as indeed they were; but for years before our Constitution they were as independent of the king's interference as they are to-day. The extent of the king's pardon was clearly circumscribed by law and the British Constitution, as the cases cited above show. The framers of our Constitution had in mind no necessity for curtailing this feature of the king's prerogative in transplanting it into the American governmental structures, save by excepting cases of impeachment; and even in that regard, as already pointed out, the common law forbade the pleading a pardon in bar to an impeachment. The suggestion that the President's power of pardon should be regarded as necessarily less than that of the king was pressed upon this court and was agreed to by Mr. Justice McLean, one of the dissenting judges, in *Ex parte William Wells*, 18 How. 307, 321, 15 L.Ed. 421, but it did not prevail with

the majority. \* \* \*

Nothing in the ordinary meaning of the words "offenses against the United States" excludes criminal contempts. That which violates the dignity and authority of federal courts such as an intentional effort to defeat their decrees justifying punishment violates a law of the United States (*In re Neagle*, 135 U.S. 1, 59, et seq., 10 S.Ct. 658, 34 L.Ed. 55), and so must be an offense against the United States. Moreover, this court has held that the general statute of limitation which forbids prosecutions "for any offense unless instituted within three years next after such offense shall have been committed," applies to criminal contempts. *Gompers v. United States*, 233 U.S. 604, 34 S.Ct. 693, 58 L.Ed. 1115, Ann.Cas.1915D, 1044. In that case this court said (page 610, 34 S.Ct. 695): "It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury, etc., to persons charged with such crimes. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. *Robertson v. Baldwin*, 165 U.S. 275, 281, 282, 17 S.Ct. 326, 41 L.Ed. 715. It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society (N.S.) p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way. See 7 Halsbury, Laws of England, 280, sub. v. Contempt of Court (604); *Re Clements v. Erlanger*, 46 L.J., N.S., pp. 375, 383; *Matter of Macleod*, 6 Jur. 461; *Schreiber v. Lateward*, 2 Dick. 592; *Wellesley's Case*, 2 Russ. & M. 639, 667; *In re Pollard*, L.R. 2 P.C. 106, 120; *Ex parte Kearney*, 7 Wheat. 38, 43, 5 L.Ed. 391; *Besette v. W. B. Conkey Co.*, 194 U.S. 324, 328, 331, 332, 24 S.Ct. 665, 48 L.Ed. 997; *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441, 31 S.Ct. 492, 55 L.Ed. 797, 34 L.R.A., N.S., 874."

The recent case of *Michaelson v. United States* fully bears out the same view. 266 U.S. 42, 66, 67, 45 S.Ct. 18, 69 L.Ed. 162.

It is said, however, that whatever may be the scope of the word "offenses" in the particular statute construed in the *Gompers Case*, its association in the Constitution is such as to show a narrower meaning. The word "offenses" is only used twice in the original Constitution, once in the pardon clause, and once in article 1, § 8, U.S.C.A.Const. art. 1, § 8, among the powers of Congress "to define and punish piracies and felonies committed on the high seas and offenses against the law of nations." In the amendments, "offense" occurs but once and that in the Fifth Amendment, U.S.C.A.Const. Amend. 5, in the clause forbidding double jeopardy. We do not see how these other two uses of the word can be said to limit the meaning of "offenses" in the pardon clause.

The argument is that the word "offenses" is used in the Constitution interchangeably with "crimes" and "criminal prosecutions." But as has been pointed out in *Schick v. United States*, 195 U.S. 65, 24 S.Ct. 826, 49 L.Ed. 99, 1 Ann.Cas. 585, the term "offenses" is used in the Constitution in a more comprehensive sense than are the terms "crimes" and "criminal prosecutions." In *Myers v. United States*, 264 U.S. 95, 104, 105, 44 S.Ct. 272, 273, 68 L.Ed. 577, we have but recently held that—"While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not 'criminal prosecutions,' within the Sixth Amendment or common understanding." *Besette v. Conkey Co.*, 194 U.S. 324, 326, 24 S.Ct. 665, 48 L.Ed. 997.

Contempt proceedings are *sui generis* because they are not hedged about with all the safeguards provided in the bill of rights for protecting one accused of ordinary crime from the danger of unjust conviction. This is due, of course, to the fact that for years before the American Constitution, courts had been held to be inherently empowered to protect themselves and the function they perform by summary proceeding without a jury to punish disobedience of their orders and disturbance of their hearings. So it is clear to us that the language of the Fifth and Sixth Amendments, U.S.C.A.Const. Amends. 5, 6, and of other cited parts of the Constitution are not of significance in determining the scope of pardons of "offenses against the United States" in article 2, § 2, cl. 1, U.S.C.A.Const. art. 2, § 2, cl. 1, of the enumerated powers of the President. We think the arguments drawn from the common law, from the power of the

king under the British Constitution, which plainly was the prototype of this clause, from the legislative history of the clause in the Convention, and from the ordinary meaning of its words, are much more relevant and convincing.

Moreover, criminal contempts of a federal court have been pardoned for 85 years. In that time the power has been exercised 27 times. In 1830, Attorney General Berrien, in an opinion on a state of fact which did not involve the pardon of a contempt, expressed merely in passing the view that the pardoning power did not include impeachments or contempts, using Rawle's general words from his work on the Constitution. Examination shows that the author's exception of contempts had reference only to contempts of a House of Congress. In 1841, Attorney General Gilpin approved the pardon of a contempt on the ground that the principles of the common law embraced such a case and this court had held that we should follow them as to pardons. 3 Op.Attys.Gen. 622. Attorney General Nelson in 1844 (4 Op.Attys.Gen. 317), Attorney General Mason in 1845 (4 Op.Attys.Gen. 458), and Attorney General Miller in 1890 (19 Op.Attys.Gen. 476), rendered similar opinions. Similar views were expressed though the opinions were not reported by Attorney General Knox in 1901 and by Attorney General Daugherty in 1923. Such long practice under the pardoning power and acquiescence in it strongly sustains the construction it is based on.

#### NOTE

1. For state cases accord, see *State v. Magee Publishing Co.*, 29 N.M. 455, 224 P. 1028 (1924); *Ex parte Magee*, 31 N.M. 276, 242 P. 332 (1925); contra, *State v. Shumaker*, 200 Ind. 716, 164 N.E. 408 (1928).

2. See J. P. Hall, *Executive Pardon in Contempt Cases*, 19 Ill. L.Rev. 176 (1928); R. Lardner, *Executive Pardon for Contempt of Court*, 2 Rocky Mt.L.Rev. 137 (1930).

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#### A. L. A. SCHECHTER POULTRY CORPORATION v. UNITED STATES.

Supreme Court of the United States, 1935. 295 U.S. 495, 55 S.Ct. 837,  
79 L.Ed. 1570, 97 A.L.R. 947.

Mr. Chief Justice HUGHES delivered the opinion of the Court. Petitioners in No. 854 were convicted in the District Court of the United States for the Eastern District of New York on eighteen counts of an indictment charging violations of what is known as the "Live Poultry Code," and on an additional count

for conspiracy to commit such violations. By demurrer to the indictment and appropriate motions on the trial, the defendants contended (1) that the code had been adopted pursuant to an unconstitutional delegation by Congress of legislative power; (2) that it attempted to regulate intrastate transactions which lay outside the authority of Congress; and (3) that in certain provisions it was repugnant to the due process clause of the Fifth Amendment.

The Circuit Court of Appeals sustained the conviction on the conspiracy count and on sixteen counts for violation of the code, but reversed the conviction on two counts which charged violation of requirements as to minimum wages and maximum hours of labor, as these were not deemed to be within the congressional power of regulation. 76 F.2d 617. On the respective applications of the defendants (No. 854) and of the government (No. 864), this Court granted writs of certiorari April 15, 1935. 295 U.S. 723, 55 S.Ct. 651, 79 L.Ed. 1676.

New York City is the largest live poultry market in the United States. Ninety-six per cent. of the live poultry there marketed comes from other states. Three-fourths of this amount arrives by rail and is consigned to commission men or receivers. Most of these freight shipments (about 75 per cent.) come in at the Manhattan Terminal of the New York Central Railroad, and the remainder at one of the four terminals in New Jersey serving New York City. The commission men transact by far the greater part of the business on a commission basis, representing the shippers as agents, and remitting to them the proceeds of sale, less commissions, freight, and handling charges. Otherwise, they buy for their own account. They sell to slaughterhouse operators who are also called marketmen.

The defendants are slaughterhouse operators of the latter class. A. L. A. Schechter Poultry Corporation and Schechter Live Poultry Market are corporations conducting wholesale poultry slaughterhouse markets in Brooklyn, New York City. Joseph Schechter operated the latter corporation and also guaranteed the credits of the former corporation, which was operated by Martin, Alex, and Aaron Schechter. Defendants ordinarily purchase their live poultry from commission men at the West Washington Market in New York City or at the railroad terminals serving the city, but occasionally they purchase from commission men in Philadelphia. They buy the poultry for slaughter and resale. After the poultry is trucked to their slaughterhouse markets in Brooklyn, it is there sold, usually within twenty-four hours, to retail poultry dealers and butchers who sell directly to consumers. The poultry purchased from defendants is immediately slaughtered, prior to delivery, by *shochtim* in de-

defendants' employ. Defendants do not sell poultry in interstate commerce.

The "Live Poultry Code" was promulgated under section 3 of the National Industrial Recovery Act, 15 U.S.C.A. § 703. That section \* \* \* authorizes the President to approve "codes of fair competition." Such a code may be approved for a trade or industry, upon application by one or more trade or industrial associations or groups, if the President finds (1) that such associations or groups "impose no inequitable restrictions on admission to membership therein and are truly representative," and (2) that such codes are not designed "to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy" of title 1 of the act, 15 U.S.C.A. § 701 et seq. Such codes "shall not permit monopolies or monopolistic practices." As a condition of his approval, the President may "impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared." Where such a code has not been approved, the President may prescribe one, either on his own motion or on complaint. Violation of any provision of a code (so approved or prescribed) "in any transaction in or affecting interstate or foreign commerce" is made a misdemeanor punishable by a fine of not more than \$500 for each offense, and each day the violation continues is to be deemed a separate offense. \* \* \*

The President approved the code by an executive order (No. 6675-A) in which he found that the application for his approval had been duly made in accordance with the provisions of title 1 of the National Industrial Recovery Act; that there had been due notice and hearings; that the code constituted "a code of fair competition" as contemplated by the act and complied with its pertinent provisions, including clauses (1) and (2) of subsection (a) of section 3 of title 1, 15 U.S.C.A. § 703(a) (1, 2); and that the code would tend "to effectuate the policy of Congress as declared in section 1 of Title I." The executive order also recited that the Secretary of Agriculture and the Administrator of the National Industrial Recovery Act had rendered separate reports as to the provisions within their respective jurisdictions. The Secretary of Agriculture reported that the provisions of the code "establishing standards of fair competition (a) are regulations of transactions in or affecting the current of interstate and/or foreign commerce and (b) are reason-

able," and also that the code would tend to effectuate the policy declared in title 1 of the act, as set forth in section 1, 15 U.S.C.A. § 701. The report of the Administrator for Industrial Recovery dealt with wages, hours of labor, and other labor provisions.

\* \* \*

Second. *The Question of the Delegation of Legislative Power.*—We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. *Panama Refining Company v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446. The Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article 1, § 1, U.S.C.A.Const. art. 1, § 1. And the Congress is authorized "To make all Laws which shall be necessary and proper for carrying into Execution" its general powers. Article 1, § 8, par. 18, U.S.C.A.Const. art. 1, § 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly. We pointed out in the *Panama Refining Company Case* that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. *Id.*, 293 U.S. 388, page 421, 55 S.Ct. 241, 79 L.Ed. 446.

Accordingly, we look to the statute to see whether Congress has overstepped these limitations—whether Congress in authorizing "codes of fair competition" has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.

The aspect in which the question is now presented is distinct from that which was before us in the case of the *Panama Refining Company*. There the subject of the statutory prohibition was defined. National Industrial Recovery Act, § 9(c), 15 U.S.C.A. § 709(c). That subject was the transportation in interstate and foreign commerce of petroleum and petroleum prod-

ucts which are produced or withdrawn from storage in excess of the amount permitted by state authority. The question was with respect to the range of discretion given to the President in prohibiting that transportation. *Id.*, 293 U.S. 388, pages 414, 415, 430, 55 S.Ct. 241, 79 L.Ed. 446. As to the "codes of fair competition," under section 3 of the act, the question is more fundamental. It is whether there is any adequate definition of the subject to which the codes are to be addressed.

What is meant by "fair competition" as the term is used in the act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? Or is it used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose and the President may approve (subject to certain restrictions), or the President may himself prescribe, as being wise and beneficent provisions for the government of the trade or industry in order to accomplish the broad purposes of rehabilitation, correction, and expansion which are stated in the first section of title 1?

The act does not define "fair competition." "Unfair competition," as known to the common law, is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. *Goodyear's Rubber Manufacturing Co. v. Goodyear Rubber Co.*, 128 U.S. 598, 604, 9 S.Ct. 166, 32 L.Ed. 535; *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U.S. 118, 140, 25 S.Ct. 609, 49 L.Ed. 972; *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 413, 36 S.Ct. 357, 60 L.Ed. 713. In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, to the selling of another's goods as one's own—to misappropriation of what equitably belongs to a competitor. *International News Service v. Associated Press*, 248 U.S. 215, 241, 242, 39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293. Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud or coercion or conduct otherwise prohibited by law. *Id.*, 248 U.S. 215, page 258, 39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293. But it is evident that in its widest range, "unfair competition," as it has been understood in the law, does not reach the objectives of the codes which are authorized by the National Industrial Recovery Act. The codes may, indeed, cover conduct which existing law condemns, but they are not limited to conduct of that sort. The government does not contend that the act contemplates such a limitation. It would be opposed both to the declared purposes of the act and to its administrative construction.

The Federal Trade Commission Act (section 5, 15 U.S.C.A. §

45) introduced the expression "unfair methods of competition," which were declared to be unlawful. That was an expression new in the law. Debate apparently convinced the sponsors of the legislation that the words "unfair competition," in the light of their meaning at common law, were too narrow. We have said that the substituted phrase has a broader meaning, that it does not admit of precise definition; its scope being left to judicial determination as controversies arise. *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 648, 649, 51 S.Ct. 587, 75 L.Ed. 1324, 79 A.L.R. 1191; *Federal Trade Commission v. R. F. Keppel*, 291 U.S. 304, 310-312, 54 S.Ct. 423, 78 L.Ed. 814. What are "unfair methods of competition" are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest. *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441, 453, 42 S.Ct. 150, 66 L.Ed. 307, 19 A.L.R. 882; *Federal Trade Commission v. Klesner*, 280 U.S. 19, 27, 28, 50 S.Ct. 1, 74 L.Ed. 138, 68 A.L.R. 838; *Federal Trade Commission v. Raladam Co.*, *supra*; *Federal Trade Commission v. R. F. Keppel*, *supra*; *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 73, 54 S.Ct. 315, 78 L.Ed. 655. To make this possible, Congress set up a special procedure. A commission, a quasi judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the commission is taken within its statutory authority. *Federal Trade Commission v. Raladam Co.*, *supra*; *Federal Trade Commission v. Klesner*, *supra*.

In providing for codes, the National Industrial Recovery Act dispenses with this administrative procedure and with any administrative procedure of an analogous character. But the difference between the code plan of the Recovery Act and the scheme of the Federal Trade Commission Act lies not only in procedure but in subject-matter. We cannot regard the "fair competition" of the codes as antithetical to the "unfair methods of competition" of the Federal Trade Commission Act. The "fair competition" of the codes has a much broader range and a new significance. The Recovery Act provides that it shall not be construed to impair the powers of the Federal Trade Commission, but, when a code is approved, its provisions are to be the "standards of fair competition" for the trade or industry concerned, and any violation of such standards in any transaction in or affecting interstate or foreign commerce is to be deemed "an unfair method of competition" within the meaning of the Federal Trade Commission Act. Section 3 (b) of the act, 15 U.S.C.A. § 703 (b).

For a statement of the authorized objectives and content of the "codes of fair competition," we are referred repeatedly to the "Declaration of Policy" in section 1 of title 1 of the Recovery Act, 15 U.S.C.A. § 701. Thus the approval of a code by the President is conditioned on his finding that it "will tend to effectuate the policy of this title." Section 3 (a) of the act, 15 U.S.C.A. § 703 (a). The President is authorized to impose such conditions "for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared." *Id.* The "policy herein declared" is manifestly that set forth in section 1. That declaration embraces a broad range of objectives. Among them we find the elimination of "unfair competitive practices." But, even if this clause were to be taken to relate to practices which fall under the ban of existing law, either common law or statute, it is still only one of the authorized aims described in section 1. It is there declared to be "the policy of Congress"—"to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

Under section 3, whatever "may tend to effectuate" these general purposes may be included in the "codes of fair competition." We think the conclusion is inescapable that the authority sought to be conferred by section 3 was not merely to deal with "unfair competitive practices" which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly disclosed to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the President would approve or prescribe, as wise and beneficent measures for the government of trades and industries in order to

bring about their rehabilitation, correction, and development, according to the general declaration of policy in section 1. Codes of laws of this sort are styled "codes of fair competition." \* \*

The question, then, turns upon the authority which section 3 of the Recovery Act vests in the President to approve or prescribe. If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. See *Panama Refining Company v. Ryan*, *supra*, and cases there reviewed.

Accordingly we turn to the Recovery Act to ascertain what limits have been set to the exercise of the President's discretion: First, the President, as a condition of approval, is required to find that the trade or industrial associations or groups which propose a code "impose no inequitable restrictions on admission to membership" and are "truly representative." That condition, however, relates only to the status of the initiators of the new laws and not to the permissible scope of such laws. Second, the President is required to find that the code is not "designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them." And to this is added a proviso that the code "shall not permit monopolies or monopolistic practices." But these restrictions leave virtually untouched the field of policy envisaged by section 1, and, in that wide field of legislative possibilities, the proponents of a code, refraining from monopolistic designs, may roam at will, and the President may approve or disapprove their proposals as he may see fit. That is the precise effect of the further finding that the President is to make—that the code "will tend to effectuate the policy of this title." While this is called a finding, it is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws. These are the only findings which Congress has made essential in order to put into operation a legislative code having the aims described in the "Declaration of Policy."

Nor is the breath of the President's discretion left to the necessary implications of this limited requirement as to his findings. As already noted, the President in approving a code may impose his own conditions, adding to or taking from what is proposed, as "in his discretion" he thinks necessary "to effectuate the policy" declared by the act. Of course, he has no less liberty when he prescribes a code on his own motion or on complaint, and he is free to prescribe one if a code has not been approved. The act provides for the creation by the President of administrative

agencies to assist him, but the action or reports of such agencies, or of his other assistants—their recommendations and findings in relation to the making of codes—have no sanction beyond the will of the President, who may accept, modify, or reject them as he pleases. Such recommendations or findings in no way limit the authority which section 3 undertakes to vest in the President with no other conditions than those there specified. And this authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country.

Such a sweeping delegation of legislative power finds no support in the decisions upon which the government especially relies. By the Interstate Commerce Act, 49 U.S.C.A. § 1 et seq., Congress has itself provided a code of laws regulating the activities of the common carriers subject to the act, in order to assure the performance of their services upon just and reasonable terms, with adequate facilities and without unjust discrimination. Congress from time to time has elaborated its requirements, as needs have been disclosed. To facilitate the application of the standards prescribed by the act, Congress has provided an expert body. That administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and its orders must be supported by findings of fact which in turn are sustained by evidence. *Interstate Commerce Commission v. Louisville & Nashville Railroad Company*, 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431; *State of Florida v. United States*, 282 U.S. 194, 51 S.Ct. 119, 75 L.Ed. 291; *United States v. Baltimore & Ohio Railroad Company*, 293 U.S. 454, 55 S.Ct. 268, 79 L.Ed. 587. When the Commission is authorized to issue, for the construction, extension, or abandonment of lines, a certificate of "public convenience and necessity," or to permit the acquisition by one carrier of the control of another, if that is found to be "in the public interest," we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers, and can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation. *New York Central Securities Corporation v. United States*, 287 U.S. 12, 24, 25, 53 S.Ct. 45, 77 L.Ed. 138; *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.*, 270 U.S. 266, 273, 46 S.Ct. 263, 70 L.Ed. 578; *Chesapeake & Ohio Railway Co. v. United States*, 283 U.S. 35, 42, 51 S.Ct. 337, 75 L.Ed. 824.

Similarly, we have held that the Radio Act of 1927 established standards to govern radio communications, and, in view of the

limited number of available broadcasting frequencies, Congress authorized allocation and licenses. The Federal Radio Commission was created as the licensing authority, in order to secure a reasonable equality of opportunity in radio transmission and reception. The authority of the Commission to grant licenses "as public convenience, interest or necessity requires" was limited by the nature of radio communications, and by the scope, character, and quality of the services to be rendered and the relative advantages to be derived through distribution of facilities. These standards established by Congress were to be enforced upon hearing and evidence by an administrative body acting under statutory restrictions adapted to the particular activity. *Federal Radio Commission v. Nelson Brothers Bond & Mtg. Co.*, 289 U.S. 266, 53 S.Ct. 627, 77 L.Ed. 1166.

In *Hampton, Jr. & Company v. United States*, 276 U.S. 394, 48 S.Ct. 348, 350, 72 L.Ed. 624 the question related to the "flexible tariff provision" of the Tariff Act of 1922. We held that Congress had described its plan "to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States." As the differences in cost might vary from time to time, provision was made for the investigation and determination of these differences by the executive branch so as to make "the adjustments necessary to conform the duties to the standard underlying that policy and plan." *Id.* 276 U.S. 394, pages 404, 405, 48 S.Ct. 348, 350, 72 L.Ed. 624. The Court found the same principle to be applicable in fixing customs duties as that which permitted Congress to exercise its rate-making power in interstate commerce, "by declaring the rule which shall prevail in the legislative fixing of rates," and then remitting "the fixing of such rates" in accordance with its provisions "to a rate-making body." *Id.* 276 U.S. 394, page 409, 48 S.Ct. 348, 352, 72 L.Ed. 624. The Court fully recognized the limitations upon the delegation of legislative power. *Id.* 276 U.S. 394, pages 408-411, 48 S.Ct. 348, 72 L.Ed. 624.

To summarize and conclude upon this point: Section 3 of the Recovery Act, 15 U.S.C.A. § 703 is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and ex-

pansion described in section 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power. \* \* \*

### NOTE

1. The only other instance in which the Supreme Court has held an Act of Congress to delegate legislative power invalidly is *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935). Since the time of the principal decision it has sustained many delegations practically as broad as those considered therein; see *Opp Cotton Mills, Inc. v. Administrator of Wages and Hours, Etc.*, 312 U.S. 126, 61 S.Ct. 524, 85 L.Ed. 624 (1941); *Yakus v. U. S.*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *American Power & Light Co. v. S. E. C.*, 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946); *Lichter v. U. S.*, — U.S. —, 68 S.Ct. 1294, 92 L.Ed. —. It has been stated that Congress has a wider power of delegation when the legislation deals with matters involving the nation's international relations than in the field of domestic affairs, *U. S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936).

2. Cases sustaining delegation of power to the President in connection with tariff laws are *Field v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892); *J. W. Hampton, Jr. & Co. v. U. S.*, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624 (1928). See Note, *The Flexible Tariff as a Delegation of Legislative Power*, 18 Va.L.Rev. 424 (1932).

3. As to scope of Congress' power to confer rule-making powers upon executive and administrative officials, see *U. S. v. Grimaud*, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911).

4. Unless the state's constitution authorizes them, the legislature may not condition the operation of general laws upon a favorable popular vote thereon, *Opinion of the Justices*, 160 Mass. 586, 36 N.E. 488 (1894); *People v. Barnett*, 344 Ill. 62, 176 N.E. 108 (1931); contra, *State v. Frear*, 142 Wis. 320, 125 N.W. 961 (1910). There is general agreement that local option legislation does not violate the principle against delegating legislative power, *Eckerson v. Des Moines*, 137 Iowa 452, 115 N.W. 177 (1908).

5. As to the extent to which the legislature of a state may condition the scope or operation of laws enacted by it upon legislative action of other states or the United States, see *Darweger v. Staats*, 267 N.Y. 290, 196 N.E. 61 (1935); *Commonwealth v. Alderman*, 275 Pa. 483, 119 A. 551 (1923); *State v. Brothers*, 144 Minn. 337, 175 N.W. 685 (1919). For discussion of similar problem with respect to Congressional legislation, see *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 (1920), and *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326 (1917).

6. As to delegation of power to private persons or agencies, cf. *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936) with *Curran v. Wallace*, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441 (1939). See Note, Delegation of Governmental Power to Private Groups, 32 Col.L.Rev. 80 (1932).

7. See on the general problem, J. B. Cheadle, The Delegation of Legislative Functions, 27 Yale L.Jour. 892 (1918); L. L. Jaffe, An Essay on Delegation of Legislative Power, 47 Col.L.Rev. 359, 561 (1947). On specific problems of delegation, see Note, Delegation of Legislative Power to Administrative Officers. Discretion to Grant or Refuse Licenses and Permits, and Power to Make Rules, 15 Calif. L.Rev. 408 (1927); Note, Delegation of Legislative Power—Adoption by State of Federal Prohibition Laws, 20 Mich.L.Rev. 652 (1922); Note, The Constitutionality of a Statute to Take Effect Upon the Contingency of a Favorable Popular Vote, 23 Yale L.Jour. 618 (1914).

## CHAPTER 4

### RELATIONS BETWEEN NATION AND STATES

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#### COYLE v. SMITH.

Supreme Court of the United States, 1911. 221 U.S. 559, 31 S.Ct. 688,  
55 L.Ed. 853.

[Error to the Supreme Court of Oklahoma. The act of Congress of June 16, 1906 (34 Stat. 267, c. 3335), under which Oklahoma was admitted to the Union, provided (section 2) that the state capital should be temporarily located at Guthrie and should not be changed prior to 1913, and that meanwhile, except so far as necessary, no public money should be appropriated for the erection of capital buildings. Section 22 provided for the irrevocable acceptance of the conditions of the act, by ordinance of the constitutional convention authorized by said act. Such an ordinance was adopted by the convention and ratified separately, along with the new state Constitution, by vote of the people. In 1910 Oklahoma passed an act removing the capital to Oklahoma City and appropriating money for capital buildings. This was upheld by the state supreme court, in a proceeding specially authorized to test its legality.]

Mr. Justice LURTON. \* \* \* The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question, then, comes to this: Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission? The argument is, that while Congress may not deprive a state of any power which it *possesses*, it may, as a condition to the admission of a new state, constitutionally restrict its authority, to the extent, at least, of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new states to this Union, and the constitutional duty of guaranteeing to "every state in this Union a republican form of government." The position of counsel for the plaintiff in error is substantially this: That the power

of Congress to admit new states, and to determine whether or not its fundamental law is republican in form, are political powers, and as such, uncontrollable by the courts. That Congress may, in the exercise of such power, impose terms and conditions upon the admission of the proposed new state, which, if accepted, will be obligatory, although they operate to deprive the state of powers which it would otherwise possess, and, therefore, not admitted upon "an equal footing with the original states."

The power of Congress in respect to the admission of new states is found in the third section of the fourth article of the Constitution. That provision is that "new states may be admitted by the Congress into this Union." The only expressed restriction upon this power is that no new state shall be formed within the jurisdiction of any other state, nor by the junction of two or more states, or parts of states, without the consent of such states, as well as of the Congress.

But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a "power to admit states." The definition of "a state" is found in the powers possessed by the original states which adopted the Constitution,—a definition emphasized by the terms employed in all subsequent acts of Congress admitting new states into the Union \* \* \* [viz.: That they shall be admitted "on an equal footing with the original states."]

The power is to admit "new states into *this* Union." "This Union" was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.

The argument that Congress derives from the duty of "guaranteeing to each state in this Union a republican form of government," power to impose restrictions upon a new state which de-

prive it of equality with other members of the Union, has no merit. It may imply the duty of such new state to provide itself with such state government, and impose upon Congress the duty of seeing that such form is not changed to one anti-republican,—*Minor v. Happersett*, 21 Wall. 162, 174, 22 L.Ed. 627, 630,—but it obviously does not confer power to admit a new state which shall be any less a state than those which compose the Union.

We come now to the question as to whether there is anything in the decisions of this court which sanctions the claim that Congress may, by the imposition of conditions in an enabling act, deprive a new state of any of those attributes essential to its equality in dignity and power with other states. In considering the decisions of this court bearing upon the question we must distinguish, first, between provisions which are fulfilled by the admission of the state; second, between compacts or affirmative legislation intended to operate in futuro, which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operate to restrict the powers of such new state in respect of matters which would otherwise be exclusively within the sphere of state power.

As to requirements in such enabling acts as relate only to the contents of the Constitution for the proposed new state, little need to be said. The constitutional provision concerning the admission of new states is not a mandate, but a power to be exercised with discretion. From this alone it would follow that Congress may require, under penalty of denying admission, that the organic law of a new state at the time of admission shall be such as to meet its approval. A Constitution thus supervised by Congress would, after all, be a Constitution of a state, and as such subject to alteration and amendment by the state after admission. Its force would be that of a state Constitution and not that of an act of Congress. \* \* \*

It may well happen that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce among the states, or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress. *Willamette Iron Bridge Co. v.*

Hatch, 125 U.S. 1, 9, 8 S.Ct. 811, 31 L.Ed. 629, 632; Pollard v. Hagan, supra, 3 How. 212, 11 L.Ed. 565.

No such question is presented here. The legislation in the Oklahoma enabling act relating to the location of the capital of the state, if construed as forbidding a removal by the state after its admission as a state, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new states. If power to impose such a restriction upon the general and undelegated power of a state be conceded as implied from the power to admit a new state, where is the line to be drawn against restrictions imposed upon new states? The insistence finds no support in the decisions of this court. \* \* \* [Here follow quotations from or references to Withers v. Buckley, 20 How. 84, 92, 15 L. Ed. 816; Escanaba Co. v. Chicago, 107 U.S. 678, 688, 2 S.Ct. 185, 27 L.Ed. 442; Ward v. Race Horse, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244; Bolln v. Nebraska, 176 U.S. 83, 87, 20 S.Ct. 287, 44 L.Ed. 382; Beecher v. Witherby, 95 U.S. 517, 24 L.Ed. 440.]

The case of the Kansas Indians, *Blue Jacket v. Johnson County*, 5 Wall. 737, 18 L.Ed. 667, involved the power of the state of Kansas to tax lands held by the individual Indians in that state under patents from the United States. The act providing for the admission of Kansas into the Union provided that nothing contained in the Constitution of the state should be construed to "impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." [12 Stat. at L. 127, c. 20.] It was held that so long as the tribal organization of such Indians was recognized as still existing, such lands were not subject to taxation by the state. The result might be well upheld either as an exertion of the power of Congress over Indian tribes, with whom the United States had treaty relations, or as a contract by which the state had agreed to forego taxation of Indian lands,—a contract quite within the power of a state to make, whether made with the United States for the benefit of its Indian wards, or with a private corporation for the supposed advantages resulting. Certainly the case has no bearing upon a compact by which the general legislative power of the state is to be impaired with reference to a matter pertaining purely to the internal policy of the state. See *Stearns v. Minnesota*, 179 U.S. 223, 244, 245, 21 S.Ct. 73, 45 L.Ed. 162. \* \* \*

Has Oklahoma been admitted upon an equal footing with the original states? If she has, she, by virtue of her jurisdictional sovereignty as such a state, may determine for her own people

the proper location of the local seat of government. She is not equal in power to them if she cannot. \* \* \* [Here follow quotations from *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227, and from *Lane County v. Oregon*, 7 Wall. 76, 19 L.Ed. 101. See the extract from these cases printed in note 1 to *Gibbons v. Ogden*, ante, at page 920.] The constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.

Judgment affirmed.

[McKENNA and HOLMES, JJ., dissented.]

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### McCULLOCH v. MARYLAND.

Supreme Court of United States, 1819. 4 Wheat. 316, 4 L.Ed. 579.

[The facts and first part of the opinion appear post, page 172. The remainder, dealing with the power of Maryland to tax the local United States branch bank, follows:]

Mr. Chief Justice MARSHALL. \* \* \* That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied. But, such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so

interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

\* \* \*

The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the Constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by, the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution.

The argument on the part of the state of Maryland, is, not that the states may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Constitution leaves them this right in the confidence that they will not abuse it.

Before we proceed to examine this argument, and to subject it to the test of the Constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the states. It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the states. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all.

It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Consti-

tution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power, which the people of a single state cannot give.

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise. But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective states, consistently with a fair construction of the Constitution?

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word "confidence." Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the state of Maryland contends, to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states.

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states.

Gentlemen say, they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the 10th section of the 1st article of the Constitution, U.S.C.A.Const. art. 1, § 10; that, with respect to everything else, the power of the states is supreme, and admits of no control. If this be true, the distinction between property and other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is

not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation. \* \* \*

[After referring to the arguments of the "Federalist":] It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme. But if the full application of this argument could be admitted, it might bring into question the right of Congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared. We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

Judgment reversed.

#### NOTE

1. The distinction drawn by the Court between state taxation of the United States and its instrumentalities and federal taxation of the states and their instrumentalities was ignored in *Collector v. Day*, 11 Wall. 113, 20 L.Ed. 122 (1871) which held invalid a federal tax on the salary of a state judge. The reciprocal character of the immunity has been recognized since that time. The distinction referred to above has been invoked in several relatively recent cases to support the theory that the scope of the federal government's immunity may be somewhat broader than that of the states; see *Helvering v. Gerhardt*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427 (1938).

2. The trend from 1890 on until the 1930's was to expand the scope of the immunity. It was granted in many situations in which its immediate beneficiaries were those dealing with the federal or state governments; see *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U.S. 522, 36 S.Ct. 453, 60 L.Ed. 779 (1916); *Gillespie v. Oklahoma*, 257 U.S. 501, 42 S.Ct. 171, 66 L.Ed. 338 (1922); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 52 S.Ct. 443, 76 L.Ed. 815 (1932); *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857 (1928); *Indian Motorcycle Co. v. U. S.*, 283 U.S. 570, 51 S.Ct. 601, 75 L.Ed. 1277 (1931); *Graves v. Texas Co.*, 298 U.S. 393, 56 S.Ct. 818, 80 L.Ed. 1236 (1936). Clear evidence of the reversal of the trend is found in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 58 S.Ct. 623, 82 L.Ed. 907 (1938), which expressly overruled the second and third cases cited above.

3. See R. W. Graham and G. Stinson, *Two Centuries of Tax Immunity*, 18 No.Car.L.Rev. 16 (1939), T. R. Powell, *The Waning of Intergovernmental Tax Immunity*, 58 Harv.L.Rev. 633, 757 (1945).

## UNITED STATES v. ALLEGHENY COUNTY.

Supreme Court of the United States, 1944.  
322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209.

Proceedings on appeal of Mesta Machine Company from assessment by the Board of Property Assessment, Appeals and Review of County of Allegheny, Pa., wherein the United States of America intervened. From a judgment of the Supreme Court of Pennsylvania reversing an order of the Court of Common Pleas reducing the assessment, 347 Pa. 191, 32 A.2d 236, the United States of America and Mesta Machine Company appeal.

Mr. Justice JACKSON delivered the opinion of the Court.

We are called upon to solve another of the recurring conflicts between the power to tax and the right to be free from taxation which are inevitable where two governments function at the same time and in the same territory. In arguing the case of *McCulloch v. Maryland*, Luther Martin, Attorney General of Maryland, himself a member of the Constitutional Convention, said, "The whole of this subject of taxation is full of difficulties, which the Convention found it impossible to solve, in a manner entirely satisfactory. The first attempt was to divide the subjects of taxation between the State and the national government. This being found impracticable, or inconvenient, the State governments surrendered altogether their right to tax imports and exports, and tonnage; giving the authority to tax all other subjects to Congress, but reserving to the States a concurrent right to tax the same subjects to an unlimited extent. This was one of the anomalies of the government, the evils of which must be endured, or mitigated by discretion and mutual forbearance." *McCulloch v. Maryland*, 4 Wheat. 316, 376, 4 L.Ed. 579. Where discretion and forbearance have failed it often has fallen to this Court to determine specific cases for which the Convention was unable to agree upon a general rule. Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand.

But since 1819, when Chief Justice Marshall in the *McCulloch* case expounded the principle that properties, functions, and instrumentalities of the Federated Government are immune from taxation by its constituent parts, this Court never has departed from that basic doctrine or wavered in its application. In the course of time it held that even without explicit congressional action immunities had become communicated to the income or property or transactions of others because they in some manner dealt with or acted for the Government. In recent years this Court has curtailed sharply the doctrine of implied delegated

immunity. But unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation. The real controversy here is whether, especially in view of recent decisions, taxing authorities of the Commonwealth of Pennsylvania have infringed this admitted immunity.

Mesta Machine Company, an appellant with the United States, exists as a corporation under the laws of Pennsylvania and has a manufacturing plant in the County of Allegheny, of that Commonwealth, the County being appellee herein. It is engaged in the manufacture of heavy machinery. In October 1940, the War Department desired to produce a quantity of large field guns. It could have assembled an organization, created a government-owned corporation, and erected a plant which would have been wholly tax immune. *Clallam County v. United States*, 263 U.S. 341, 44 S.Ct. 121, 68 L.Ed. 328. But for reasons of time and policy it chose to utilize a going concern under private management and ownership. Mesta's plant was not equipped for the manufacture of ordnance. It was agreed that certain additional equipment specially required for the work should be furnished at Government cost and should remain the property of the United States.

The basic arrangement between Mesta and the Government was provided for by three separate titles of a single contract, made in October 1940. A title was devoted to each feature of the arrangement, being generally: procurement of Government-owned equipment at Government cost; lease of such equipment by the Government to Mesta; and Mesta's undertaking to make and deliver the guns at a fixed price each. In February 1941 a supplemental contract was made.

Under the first title of the contract machinery was to be procured in three possible ways: Mesta, as an independent contractor and not as agent of the Government, could purchase it; Mesta could manufacture it; or the Government at its option could furnish any part of it. In carrying out the agreement Mesta manufactured one machine, the Government furnished eight gun-boring lathes and two rifling machines from its Watervliet Arsenal, and the rest Mesta purchased from other machine-tool manufacturers. The machinery bought or built by Mesta was inspected and accepted on behalf of the United States, which thereupon compensated Mesta as agreed. The contract

provided that title to all such property should vest in the Government upon delivery at the site of work and inspection and acceptance.

By the second title of the contract the Government leased this equipment to Mesta for the period during which guns are manufactured by it under this contract or later supplements. As rental Mesta agreed to pay the sum of one dollar. Mesta was permitted to use the equipment "for the purpose of expediting the manufacture of guns" and for no other, without consent, except that such machinery as was "purchased or furnished to supplement its existing facilities" might be used "for general purposes." Liability of Mesta for loss, damage, or destruction of equipment was "that of a bailee under a mutual benefit bailment." Mesta could not remove any of it without permission, and at all times it was accessible to Government inspection. On termination of the gun-supply contract, unless a stand-by contract was made, Mesta agreed to remove and ship the equipment according to Government directions, in good condition subject to fair wear and tear and depreciation. \* \* \*

The machinery was bolted on concrete foundations in Mesta's plant on real property owned by it. It could be removed without damage to the building.

The present controversy flared when the assessing authorities of Allegheny County revised Mesta's previously determined assessment for ad valorem taxes. They added thereto the value of the machinery in question, fixed at \$618,000. This included property acquired from other tool manufacturers as above described, \$444,000; that manufactured by Mesta, \$14,000; lathes brought from the Watervliet Arsenal, \$160,000. Mesta protested and exhausted administrative remedies without avail, and on July 30, 1942, paid under protest \$5,137.12, the amount of the tax attributable to this increased assessment. \* \* \*

## I.

It is denied that the Government has valid title to the machinery. \* \* \*

We hold that title to the property in question is in the United States and is effective for tax purposes.

## II.

The County denies, however, that it is taxing property belonging to the United States. First, it says it taxes only the land, which the United States does not own; and the machinery

is not taxed, but is considered only as an enhancement of the value of the land to Mesta, its owner. Secondly, it says the lien of the tax does not encumber and the process of collection does not involve any sale or other interference with the machinery. The Pennsylvania Supreme Court has upheld the questioned tax because upon these grounds it concluded that no interference with the federal function resulted.

"Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *Carpenter v. Shaw*, 280 U.S. 363, 367, 368, 50 S.Ct. 121, 123, 74 L.Ed. 478. \* \* \*

We hold that the substance of this procedure is to lay an *ad valorem* general property tax on property owned by the United States.

### III.

It is contended, however, that Government title does not prevent such state taxation, because the incidence of the tax is borne by Mesta, not the Government, and the taxation creates no lien upon its property or interference with its function.

The Commonwealth certainly has broad powers and choices of methods to tax Mesta, a corporation created by it and domiciled and operating within its borders. The trend of recent decisions has been to withdraw private property and profits from the shelter of governmental immunity but without impairing the immunity of the State or the Nation itself. Benefits which a contractor receives from dealings with the Government are subject to state income taxation. Salaries received from it may be taxed. The fact that materials are destined to be furnished to the Government does not exempt them from sales taxes imposed on the contractor's vendor. But in all of these cases what we have denied is immunity for the contractor's own property, profits, or purchases. We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands. The distinction between taxation of private interests and taxation of governmental interests, although sometimes difficult to define, is fundamental in application of the immunity doctrine as developed in this country.

Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. Its leasehold interest

is subject to some qualification of the right to use the property except for gun manufacture, is limited to the period it engages in such work, and is perhaps burdened by other contractual conditions. We have held that where private interests in property were so preponderant that all the Government held was a naked title and a nominal interest, the whole value was taxable to the equitable owner. *Northern Pacific R. Co. v. Myers*, 172 U.S. 589, 19 S.Ct. 276, 43 L.Ed. 564; *City of New Brunswick v. United States*, 276 U.S. 547, 48 S.Ct. 371, 72 L.Ed. 693. But that is not the situation here, and the State has made no effort to segregate Mesta's interest and tax it. The full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment.

It is contended the whole value of the property may be reached since the impact of the tax is upon Mesta. In support of this we are reminded that the tax, so the Supreme Court of Pennsylvania held, falls upon the real estate alone, because the lien thereof does not touch the Government's property, which before or after tax default may be removed. But renunciation of any lien on Government property itself, which could not be sustained in any event, hardly establishes that it is not being taxed. The fact is that the lien on the underlying land is increased because of and in proportion to the assessment of the machinery. If the tax is collected by selling the land out from under the machinery, the effect on its usefulness to the Government would be almost as disastrous as to sell the machinery itself. The coercion of payment from compelling the Government to move its property and interrupt production at the Mesta plant would defeat the purpose of the Government in owning and leasing it.

We think, however, that the Government's property interests are not taxable either to it or to its bailee. The "Government" is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in some one who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed as we have held. But neither he nor the Government can be taxed for the Government's property interest. Rarely does a state or municipality pursue the Federal Government itself. Most of the immunity cases we have been called upon to deal with involved assertion of a right to tax Government property against an individual.

In *United States v. Rickert*, 188 U.S. 432, 23 S.Ct. 478, 483, 47 L.Ed. 532, this Court decided that improvements made upon lands to which the United States held title but which were put in possession of Indians for their benefit remained immune from taxation and that cattle, horses, and chattels purchased with the money of the Government and "put into the hands of the Indians to be used in execution of the purpose of the government in reference to them" were likewise immune from taxation. In *Van Brocklin v. Tennessee*, 117 U.S. 151, 6 S.Ct. 670, 29 L.Ed. 845, Tennessee attempted to sell for state taxes lands which the United States owned at the time the taxes were assessed and levied, but in which it had ceased to have any interest at the time of sale. There, as here, it was claimed the collection affected only private persons, whose equities in the matter were at least doubtful, and that the United States could suffer no harm. The Court held, however, that the immunity protected the private owner for the tax had been laid against an interest of the Government which was beyond the reach of state taxing power. See also *Irwin v. Wright*, 258 U.S. 219, 42 S.Ct. 293, 66 L.Ed. 573; *Lee v. Osceola & Little River Road Improvement District*, 268 U.S. 643, 45 S.Ct. 620, 69 L.Ed. 1133.

A state may tax personal property and might well tax it to one in whose possession it was found, but it could hardly tax one of its citizens because of moneys of the United States which were in his possession as Collector of Internal Revenue, Postmaster, Clerk of the United States Court, or other federal officer, agent, or contractor. We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee.

#### IV.

We find no support for the claim that the immunity has been waived. Congress certainly has not done so. It is true that the contract requires Mesta to obey and abide by the "applicable" law of Pennsylvania. But such language does not require Mesta to submit to unconstitutional exactions. It clearly is inadequate to waive federal immunity, even if we assume a contracting officer had power to do so. Likewise any contractual obligation of the War Department to pay Mesta's taxes does not operate either to waive or to create an immunity. Nor is the validity of the tax dependent upon the ultimate resting place of the economic burden of the tax. We also think it immaterial what, if any, right of reimbursement the Pennsylvania law grants

a lessee against a private lessor in similar circumstances. State law could not obligate the Central Government to reimburse for a valid tax, much less for an invalid one.

Each party urges equities in its favor. The Government points to the exigencies of war, points to numerous and increasing state efforts to tax such property, and urges against the decision below that it is a precedent for taxation of a substantial portion of property of the Government valued at  $7\frac{1}{2}$  billion dollars in the possession and use of private contractors engaged in war production. It owns property on private lands, under contracts similar to this, with a value approximating two billion dollars, over \$257,000,000 of it located in Pennsylvania.

Appellees, and especially the amici, on the other hand, point for a different purpose to the amount of Government property in war production. It is said that increased municipal services, to serve and protect the influx of war workers, are required in all communities where large war contracts of this type are placed; that such local services rely heavily on real estate taxation; that to exclude property such as this, together with the large real estate holdings that have been and are being acquired by the Government, imposes this increased cost on others. While validation of assessments of this character will measurably increase the cost of waging the war, it is argued that the Federal Government may diffuse the cost throughout the country instead of putting a back-breaking burden on local governments where war plants are located. For these reasons we are urged to hold the position of the Government "unsound, as well as inequitable."

Such considerations remind us of our heavy responsibility in deciding the issues but hardly provide a guide or alter the usual principles for decision. The equities in this unfortunate conflict between the United States and one of its most important industrial communities are not capable of judicial ascertainment or equalization. Whether a county loses more than it gains by such federal activity, and what other federal benefits ought to be considered if a balance were to be struck between advantages and disadvantages, we cannot say. The adjustment of benefits and burdens is for other departments, and studies to that end have been undertaken. We can only say that our constitutional system as judicially interpreted from the beginning leaves no room for the localities to impose either compensatory or retaliatory taxation on Government property interests. Their remedy lies in petition to the Federal Congress, which also is their Congress. \* \* \*

The Tax Law of the Commonwealth of Pennsylvania as interpreted and applied in this case violates the Federal Constitution in so far as it purports to authorize taxation of the property interests of the United States in the machinery in Mesta's plant, or to use that interest to tax or to enhance the tax upon the Government's bailee. The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice BLACK and Mr. Justice DOUGLAS concur in the result.

Mr. Justice ROBERTS and Mr. Justice FRANKFURTER rendered separate dissenting opinions.

#### NOTE

1. Cf. *Reconstruction Finance Corp. v. Beaver County, Pa.*, 328 U.S. 204, 66 S.Ct. 992, 90 L.Ed. 1172 (1946).

2. See also *New Brunswick v. U. S.*, 276 U.S. 547, 48 S.Ct. 371, 72 L.Ed. 693 (1928).

3. For recent discussion of a state's power to tax realty, sold by the United States under an executory contract of sale, prior to execution of deed to the vendee, see *S. R. A., Inc., v. Minnesota*, 327 U.S. 558, 66 S.Ct. 749, 90 L.Ed. 851 (1946).

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#### STATE OF NEW YORK v. UNITED STATES.

Supreme Court of the United States, 1946.  
326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326.

Mr. Justice FRANKFURTER announced the judgment of the Court and delivered an opinion in which Mr. Justice RUTLEDGE joined.

Section 615(a) (5) of the 1932 Revenue Act, 47 Stat. 169, 264, 26 U.S.C.A. Int.Rev.Acts, page 614, imposed a tax on mineral waters. The United States brought this suit to recover taxes assessed against the State of New York on the sale of mineral waters taken from Saratoga Springs, New York. The State claims immunity from this tax on the ground that "in the bottling and sale of the said waters the defendant State of New York was engaged in the exercise of a usual, traditional and essential governmental function." The claim was rejected by the District Court and judgment went for the United States. 48 F.Supp. 15. The judgment was affirmed by the Circuit Court of Appeals for the Second Circuit. 140 F.2d 608. The strong urging of New York for further clarification of the amenability of States to the

taxing power of the United States led us to grant certiorari. 322 U.S. 724, 64 S.Ct. 1286, 88 L.Ed. 1561. After the case was argued at the 1944 Term, reargument was ordered.

On the basis of authority the case is quickly disposed of. When States sought to control the liquor traffic by going into the liquor business, they were denied immunity from federal taxes upon the liquor business. *State of South Carolina v. United States*, 199 U.S. 437, 26 S.Ct. 110, 50 L.Ed. 261, 4 Ann.Cas. 737; *State of Ohio v. Helvering*, 292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307. And in rejecting a claim of immunity from federal taxation when Massachusetts took over the street railways of Boston, this Court a decade ago said: "We see no reason for putting the operation of a street railway [by a State] in a different category from the sale of liquors." *Helvering v. Powers*, 293 U.S. 214, 227, 55 S.Ct. 171, 174, 79 L.Ed. 291. We certainly see no reason for putting soft drinks in a different constitutional category from hard drinks. See also *Allen v. Regents*, 304 U.S. 439, 58 S.Ct. 980, 82 L.Ed. 1448.

One of the greatest sources of strength of our law is that it adjudicates concrete cases and does not pronounce principles in the abstract. But there comes a time when even the process of empiric adjudication calls for a more rational disposition than that the immediate case is not different from preceding cases. The argument pressed by New York and the forty-five other States who, as amici curiae, have joined her deserves an answer.

Enactments levying taxes made in pursuance of the Constitution are, as other laws are, "the supreme Law of the Land." Art. VI, Constitution of the United States; *Flint v. Stone Tracy Co.*, 220 U.S. 107, 108, 153, 31 S.Ct. 342, 350, 55 L.Ed. 389, Ann.Cas. 1912B, 1312. The first of the powers conferred upon Congress is the power "To lay and collect Taxes, Duties, Imposts and Excises \* \* \*." Art. I, § 8. By its terms the Constitution has placed only one limitation upon this power, other than limitations upon methods of laying taxes not here relevant: Congress can lay no tax "on Articles exported from any State." Art. I, § 9. Barring only exports, the power of Congress to tax "reaches every subject." *License Tax Cases*, 5 Wall. 462, 471, 18 L.Ed. 497. But the fact that ours is a federal constitutional system, as expressly recognized in the Tenth Amendment, carries with it implications regarding the taxing power as in other aspects of government. See, e. g., *Hopkins Federal Savings Ass'n v. Cleary*, 296 U.S. 315, 56 S.Ct. 235, 80 L.Ed. 251, 100 A.L.R. 1403. Thus, for Congress to tax State activities while leaving untaxed the same activities pursued by private persons would do violence to the presuppositions derived from the fact that we are a Nation composed of States.

But the fear that one government may cripple or obstruct the operations of the other early led to the assumption that there was a reciprocal immunity of the instrumentalities of each from taxation by the other. It was assumed that there was an equivalence in the implications of taxation by a State of the governmental activities of the National Government and the taxation by the National Government of State instrumentalities. This assumed equivalence was nourished by the phrase of Chief Justice Marshall that "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 4 Wheat. 316, 431, 4 L.Ed. 579. To be sure, it was uttered in connection with a tax of Maryland which plainly discriminated against the use by the United States of the Bank of the United States as one of its instruments. What he said may not have been irrelevant in its setting. But Chief Justice Marshall spoke at a time when social complexities did not so clearly reveal as now the practical limitations of a rhetorical absolute. See *Holmes, J., in Long v. Rockwood*, 277 U.S. 142, 148, 48 S.Ct. 463, 464, 72 L.Ed. 824, and in *Panhandle Oil Co. v. State of Mississippi*, 277 U.S. 218, 223, 48 S.Ct. 451, 453, 72 L.Ed. 857, 56 A.L.R. 583. The phrase was seized upon as the basis of a broad doctrine of intergovernmental immunity, while at the same time an expansive scope was given to what were deemed to be "instrumentalities of the government" for purposes of tax immunity. As a result, immunity was until recently accorded to all officers of one government from taxation by the other, and it was further assumed that the economic burden of a tax on any interest derived from a government imposes a burden on that government so as to involve an interference by the taxing government with the functioning of the other government. See *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384; *Helvering v. Mountain Producers Corporation*, 303 U.S. 376, 58 S.Ct. 623, 82 L.Ed. 907; *Graves v. People of State of New York ex rel. O'Keefe*, 306 U.S. 466, 480, 481, 59 S.Ct. 595, 598, 599, 83 L.Ed. 927, 120 A.L.R. 1466.

To press a juristic principle designed for the practical affairs of government to abstract extremes is neither sound logic nor good sense. And this Court is under no duty to make law less than sound logic and good sense. When this Court for the first time relieved State officers from a non-discriminatory Congressional tax, not because of anything said in the Constitution but because of the supposed implications of our federal system, Mr. Justice Bradley pointed out the invalidity of the notion of reciprocal intergovernmental immunity. The considerations bearing upon taxation by the States of activities or agencies of the federal government are not correlative with the considerations bearing upon

federal taxation of State agencies or activities. The federal government is the government of all the States, and all the States share in the legislative process by which a tax of general applicability is laid. "The taxation by the State governments of the instruments employed by the general government in the exercise of its powers," said Mr. Justice Bradley, "is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation." Since then we have moved away from the theoretical assumption that the National Government is burdened if its functionaries, like other citizens, pay for the upkeep of their State governments, and we have denied the implied constitutional immunity of federal officials from State taxes. *Graves v. People of State of New York ex rel. O'Keefe*, supra. See *Gillespie v. State of Oklahoma*, 257 U.S. 501, 42 S.Ct. 171, 66 L.Ed. 338, criticized in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 401, 52 S.Ct. 443, 445, 76 L.Ed. 815, and explicitly overruled in *Helvering v. Mountain Producers Corporation*, 303 U.S. 376, 58 S.Ct. 623, 82 L.Ed. 907; *Long v. Lockwood*, 277 U.S. 142, 48 S.Ct. 463, 72 L.Ed. 824, overruled in *Fox Film Corporation v. Doyal*, 286 U.S. 123, 52 S.Ct. 546, 76 L.Ed. 1010; *Collector v. Day*, 11 Wall. 113, 20 L.Ed. 122, and *People of State of New York ex rel. Rogers v. Graves*, 299 U.S. 401, 57 S.Ct. 269, 81 L.Ed. 306, overruled in *Graves v. People of State of New York ex rel. O'Keefe*, supra.

In the meantime, cases came here, as we have already noted, in which States claimed immunity from a federal tax imposed generally on enterprises in which the State itself was also engaged. This problem did not arise before the present century, partly because State trading did not actively emerge until relatively recently, and partly because of the narrow scope of federal taxation. In *State of South Carolina v. United States*, 199 U.S. 437, 26 S.Ct. 110, 50 L.Ed. 261, 4 Ann.Cas. 737, immunity from a federal tax on a dispensary system, whereby South Carolina monopolized the sale of intoxicating liquors, was denied by drawing a line between taxation of the historically recognized governmental functions of a State, and business engaged in by a State of a kind which theretofore had been pursued by private enterprise. The power of the federal government thus to tax a liquor business conducted by the State was derived from an appeal to the Constitution "in the light of conditions surrounding at the time of its adoption." *State of South Carolina v. United States*, supra, 199 U.S. at page 457, 26 S.Ct. at page 115, 50 L.Ed. 261, 4 Ann.Cas. 737. That there is a Constitutional line between the State as government and the State as trader, was still more recently made the

basis of a decision sustaining a liquor tax against Ohio. "If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function. \* \* \* When a state enters the market place seeking customers it divests itself of its quasi sovereignty pro tanto, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned." *State of Ohio v. Helvering*, supra, 292 U.S. at page 369, 54 S.Ct. at page 726, 78 L.Ed. 1307. When the Ohio case was decided it was too late in the day not to recognize the vast extension of the sphere of government, both State and national, compared with that with which the Fathers were familiar. It could hardly remain a satisfactory constitutional doctrine that only such State activities are immune from federal taxation as were engaged in by the States in 1787. Such a static concept of government denies its essential nature. "The science of government is the most abstruse of all sciences; if, indeed, that can be called a science, which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment." *Anderson v. Dunn*, 6 Wheat. 204, 226, 5 L.Ed. 242.

When this Court came to sustain the federal taxing power upon a transportation system operated by a State, it did so in ways familiar in developing the law from precedent to precedent. It edged away from reliance on a sharp distinction between the "governmental" and the "trading" activities of a State, by denying immunity from federal taxation to a State when it "is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the state." *Helvering v. Powers*, supra, 293 U.S. at page 227, 55 S.Ct. at page 174, 79 L.Ed. 291. But this likewise does not furnish a satisfactory guide for dealing with such a practical problem as the constitutional power of the United States over State activities. To rest the federal taxing power on what is "normally" conducted by private enterprise in contradiction to the "usual" governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion. The essential nature of the problem cannot be hidden by an attempt to separate manifestations of indivisible governmental powers. See Wambaugh, *Present Scope of Government* (1897) 20 A.B.A.Rep. 307; Frankfurter, *The Public and its Government* (1930).

The present case illustrates the sterility of such an attempt. New York urges that in the use it is making of Saratoga Springs it is engaged in the disposition of its natural resources. And so it is. But in doing so it is engaged in an enterprise in which the State sells mineral waters in competition with private waters, the sale of which Congress has found necessary to tap as a source of revenue for carrying on the National Government. To say that the States cannot be taxed for enterprises generally pursued, like the sale of mineral water, because it is somewhat connected with a State's conservation policy, is to invoke an irrelevance to the federal taxing power. Liquor control by a State certainly concerns the most important of a State's natural resources—the health and well-being of its people. See *Mugler v. State of Kansas*, 123 U.S. 623, 662, 8 S.Ct. 273, 297, 31 L.Ed. 205; *Crane v. Campbell*, 245 U.S. 304, 307, 38 S.Ct. 98, 99, 62 L.Ed. 304. If in its wisdom a State engages in the liquor business and may be taxed by Congress as others engaged in the liquor business are taxed, so also Congress may tax the States when they go into the business of bottling water as others in the mineral water business are taxed even though a State's sale of its mineral waters has relation to its conservation policy.

In the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity. They also indicate an awareness of the limited role of courts in assessing the relative weight of the factors upon which immunity is based. Any implied limitation upon the supremacy of the federal power to levy a tax like that now before us, in the absence of discrimination against State activities, brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges. Indeed the claim of implied immunity by States from federal taxation raises questions not wholly unlike provisions of the Constitution, such as that of Art. IV, § 4, guaranteeing States a republican form of government, see *Pacific States Tel. & T. Co. v. State of Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377, which this Court has deemed not within its duty to adjudicate.

We have already held that by engaging in the railroad business a State cannot withdraw the railroad from the power of the federal government to regulate commerce. *United States v. State of California*, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567. See also *University of Illinois v. United States*, 289 U.S. 48, 53 S.Ct. 509, 77 L.Ed. 1025. Surely the power of Congress to lay taxes

has impliedly no less a reach than the power of Congress to regulate commerce. There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. If Congress desires, it may of course leave untaxed enterprises pursued by States for the public good while it taxes like enterprises organized for private ends. Cf. *Springfield Gas Co. v. City of Springfield*, 257 U.S. 66, 42 S.Ct. 24, 66 L.Ed. 131; *University of Illinois v. United States*, supra, 289 U.S. at 57, 53 S.Ct. 509, 77 L.Ed. 1025; *Puget Sound Co. v. City of Seattle*, 291 U.S. 619, 54 S.Ct. 542, 78 L.Ed. 1025. If Congress makes no such differentiation and, as in this case, taxes all vendors of mineral water alike, whether State vendors or private vendors, it simply says, in effect, to a State: "You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy." After all, the representatives of all the States, having, as the appearance of the Attorneys General of forty-six States at the bar of this Court shows, common interests, alone can pass such a taxing measure and they alone in their wisdom can grant or withhold immunity from federal taxation of such State activities.

The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court. The restriction upon States not to make laws that discriminate against interstate commerce is a vital constitutional principle, even though "discrimination" is not a code of specifics but a continuous process of application. So we decide enough when we reject limitations upon the taxing power of Congress derived from such untenable criteria as "proprietary" against "governmental" activities of the States, or historically sanctioned activities of Government or activities conducted merely for profit, and find no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter.

Judgment affirmed.

## NOTE

1. The theory that the validity of a federal tax on a state activity depended upon the governmental or non-governmental character thereof was first applied in *South Carolina v. U. S.*, 199 U.S. 437, 26 S.Ct. 110, 50 L.Ed. 261 (1905). There have been numerous decisions applying this principle to various state and municipal functions; see *State of Ohio v. Helvering*, 292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307 (1934); *Allen v. Regents of University System of Georgia*, 304 U.S. 439, 58 S.Ct. 980, 82 L.Ed. 1448 (1938). In the reported case Justices Douglas and Black dissented, expressing the view that *South Carolina v. U. S.* was incorrectly decided. See J. H. Cohen and K. Dayton, *Federal Taxation of State Activities and State Taxation of Federal Activities*, 34 *Yale L. Jour.* 807 (1925); Note, *Intergovernmental Tax Immunity: The Saratoga Springs Case*, 55 *Yale L.Jour.* 805 (1946).

2. All of the activities of the federal government are considered governmental and hence immune from state taxation; *Van Brocklin v. Tennessee*, 117 U.S. 151, 6 S.Ct. 670, 29 L.Ed. 845 (1886); *New York ex rel. Rogers v. Graves*, 299 U.S. 401, 57 S.Ct. 269, 81 L.Ed. 306 (1937).

3. Sales taxes and other excises imposed by states upon transactions to which the United States is a party, or where the incidence of the tax is upon it, would probably be sustained today (see *Alabama v. King and Boozer*, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941)) despite *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857 (1928) and *Graves v. Texas Co.*, 298 U.S. 393, 56 S.Ct. 818, 80 L.Ed. 1236 (1936). The same holds for federal sales taxes and excises on similar transactions with a state, despite *Indian Motorcycle Co. v. U. S.*, 283 U.S. 570, 51 S.Ct. 601, 75 L.Ed. 1277 (1931).

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GRAVES v. PEOPLE OF THE STATE OF NEW  
YORK ex rel. O'KEEFE.

Supreme Court of the United States, 1939.  
306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927.

Mr. Justice STONE delivered the opinion of the Court.

We are asked to decide whether the imposition by the State of New York of an income tax on the salary of an employee of the Home Owners' Loan Corporation places an unconstitutional burden upon the federal government. \* \* \*

For the purposes of this case we may assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the federal government. Cf. *Kay v. United States*, 303 U.S. 1, 58 S.Ct. 468, 82 L.Ed. 607. As that government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge

of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation. \* \* \* And when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments. \* \*

The single question with which we are now concerned is whether the tax laid by the state upon the salary of respondent, employed by a corporate instrumentality of the federal government, imposes an unconstitutional burden upon that government. The theory of the tax immunity of either government, state or national, and its instrumentalities, from taxation by the other, has been rested upon an implied limitation on the taxing power of each, such as to forestall undue interference, through the exercise of that power, with the governmental activities of the other. That the two types of immunity may not, in all respects, stand on a parity has been recognized from the beginning, *McCulloch v. Maryland*, supra, pages 435, 436 of 4 Wheat., and possible differences in application, deriving from differences in the source, nature and extent of the immunity of the governments and their agencies, were pointed out and discussed by this Court in detail during the last term. \* \* \*

So far as now relevant, those differences have been thought to be traceable to the fact that the federal government is one of delegated powers in the exercise of which Congress is supreme; so that every agency which Congress can constitutionally create is a governmental agency. And since the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of federal agencies from state taxation. \* \* \* Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies which courts have implied, is a question which need not now be determined.

Congress has declared in § 4 of the Act that the Home Owners' Loan Corporation is an instrumentality of the United States and that its bonds are exempt, as to principal and interest, from federal and state taxation, except surtaxes, estate, inheritance and gift taxes. The corporation itself, "including its franchise, its

capital, reserves and surplus, and its loans and income," is likewise exempted from taxation; its real property is subject to tax to the same extent as other real property. But Congress has given no intimation of any purpose either to grant or withhold immunity from state taxation of the salary of the corporation's employees, and the Congressional intention is not to be gathered from the statute by implication. \* \* \*

It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.

The present tax is non-discriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable. \* \* \* and the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic

burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions.

In the four cases in which this Court has held that the salary of an officer or employee of one government or its instrumentality was immune from taxation by the other, it was assumed, without discussion, that the immunity of a government or its instrumentality extends to the salaries of its officers and employees. This assumption, made with respect to the salary of a governmental officer in *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, 10 L.Ed. 1022, and in *Collector v. Day*, 11 Wall. 113, 20 L.Ed. 122, was later extended to confer immunity on income derived by a lessee from lands leased to him by a government in the performance of a governmental function, *Gillespie v. Oklahoma*, 257 U.S. 501, 42 S.Ct. 171, 66 L.Ed. 338; *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 52 S.Ct. 443, 76 L.Ed. 815, and cases cited, although the claim of a like exemption from tax on the income of a contractor engaged in carrying out a government project was rejected both in the case of a contractor with a state, *Metcalf & Eddy v. Mitchell*, and of a contractor with the national government, *James v. Dravo Contracting Co.*

The ultimate repudiation in *Helvering v. Mountain Producers Corp.*, *supra*, of the doctrine that a tax on the income of a lessee derived from a lease of government owned or controlled lands is a forbidden interference with the activities of the government concerned led to the re-examination by this Court, in the *Gerhardt* case, of the theory underlying the asserted immunity from taxation by one government of salaries of employees of the other. It was there pointed out that the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed. \* \* \* It was further pointed out that, as applied to the taxation of salaries of the employees of one government, the purpose of the immunity was not to confer benefits on the employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy, or to give an advantage to that government by enabling it to engage employees at salaries lower than those paid for like services by other employers, public or

private, but to prevent undue interference with the one government by imposing on it the tax burden of the other.

In applying these controlling principles in the *Gerhardt* case the Court held that the salaries of employees of the New York Port Authority, a state instrumentality created by New York and New Jersey, were not immune from federal income tax, even though the Authority be regarded as not subject to federal taxation. It was said that the taxpayers enjoyed the benefit and protection of the laws of the United States and were under a duty, common to all citizens, to contribute financial support to the government; that the tax laid on their salaries and paid by them could be said to affect or burden their employer, the Port Authority, or the states creating it, only so far as the burden of the tax was economically passed on to the employer; that a non-discriminatory tax laid on the income of all members of the community could not be assumed to obstruct the function which New York and New Jersey had undertaken to perform, or to cast an economic burden upon them, more than does the general taxation of property and income which, to some extent, incapable of measurement by economists, may tend to raise the price level of labor and materials. The Court concluded that the claimed immunity would do no more than relieve the taxpayers from the duty of financial support to the national government in order to secure to the state a theoretical advantage, speculative in character and measurement and too unsubstantial to form the basis of an implied constitutional immunity from taxation.

The conclusion reached in the *Gerhardt* case that in terms of constitutional tax immunity a federal income tax on the salary of an employee is not a prohibited burden on the employer makes it imperative that we should consider anew the immunity here claimed for the salary of an employee of a federal instrumentality. As already indicated, such differences as there may be between the implied tax immunity of a state and the corresponding immunity of the national government and its instrumentalities may be traced to the fact that the national government is one of delegated powers, in the exercise of which it is supreme. Whatever scope this may give to the national government to claim immunity from state taxation of all instrumentalities which it may constitutionally create, and whatever authority Congress may possess as incidental to the exercise of its delegated powers to grant or withhold immunity from state taxation, Congress has not sought in this case to exercise such power. Hence these distinctions between the two types of immunity cannot affect the question with which we are now concerned. The burden on government of a non-discriminatory income tax applied to the salary

of the employee of a government or its instrumentality is the same, whether a state or national government is concerned. The determination in the *Gerhardt* case that the federal income tax imposed on the employees of the Port Authority was not a burden on the Port Authority made it unnecessary to consider whether the Authority itself was immune from federal taxation; the claimed immunity failed because even if the Port Authority were itself immune from federal income tax, the tax upon the income of its employees cast upon it no unconstitutional burden.

Assuming, as we do, that the Home Owners' Loan Corporation is clothed with the same immunity from state taxation as the government itself, we cannot say that the present tax on the income of its employees lays any unconstitutional burden upon it. All the reasons for refusing to imply a constitutional prohibition of federal income taxation of salaries of state employees, stated at length in the *Gerhardt* case, are of equal force when immunity is claimed from state income tax on salaries paid by the national government or its agencies. In this respect we perceive no basis for a difference in result whether the taxed income be salary or some other form of compensation, or whether the taxpayer be an employee or an officer of either a state or the national government, or of its instrumentalities. In no case is there basis for the assumption that any such tangible or certain economic burden is imposed on the government concerned as would justify a court's declaring that the taxpayer is clothed with the implied constitutional tax immunity of the government by which he is employed. That assumption, made in *Collector v. Day*, and in *New York ex rel. Rogers v. Graves*, is contrary to the reasoning and to the conclusions reached in the *Gerhardt* case and in *Metcalf & Eddy v. Mitchell*; *Group No. 1 Oil Corporation v. Bass*, 283 U.S. 279, 51 S.Ct. 432, 75 L.Ed. 1032; *James v. Dravo Contracting Co.*; *Helvering v. Mountain Producers Corp.*; *McLoughlin v. Commissioner*, 303 U.S. 218, 58 S.Ct. 539, 82 L.Ed. 758. In their light the assumption can no longer be made. *Collector v. Day*, and *New York ex rel. Rogers v. Graves*, are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities.

So much of the burden of a nondiscriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect

the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction to the taxing power which the Constitution has reserved to the state governments.

Reversed.

Mr. Chief Justice HUGHES concurs in the result, and Mr. Justice FRANKFURTER, concurred in a separate opinion.

### NOTE

1. The reported case extends to governmental officials and employees the rule earlier applied to independent contractors with the federal or state government; see *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384 (1926); *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937). The course of development can be traced through *Helvering v. Powers*, 293 U.S. 214, 55 S.Ct. 171, 79 L.Ed. 291 (1934); *New York ex rel. Rogers v. Graves*, 299 U.S. 401, 57 S.Ct. 269, 81 L.Ed. 306 (1937); *Brush v. Commissioner of Internal Revenue*, 300 U.S. 352, 57 S.Ct. 495, 81 L.Ed. 691 (1937); *Helvering v. Therrell*, 303 U.S. 218, 58 S.Ct. 539, 82 L.Ed. 758 (1938); *Helvering v. Gerhardt*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427 (1938). These cases also illustrate the importance of the character of state function with which the employee was connected as a factor in determining the taxability of his compensation by the United States.

2. *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895) held the interest on state and municipal bonds immune from federal income taxation. It has not yet been overruled. Federal bonds and the interest thereon are immune to state taxation, *Weston v. Charleston*, 2 Pet. 449, 7 L.Ed. 481 (1829); *Farmers' and Mechanics' Sav. Bank v. Minnesota*, 232 U.S. 516, 34 S.Ct. 354, 58 L.Ed. 706 (1914). The gain on sale of state bonds may be taxed by the United States, *Willcuts v. Bunn*, 282 U.S. 216, 51 S.Ct. 125, 75 L.Ed. 304 (1931).

3. Indirect methods by a state to tax federal bonds and the interest thereon by including their value or such interest in the measure of a tax subject within the state's power have been sustained in some instances, *Plummer v. Coler*, 178 U.S. 115, 20 S.Ct. 829, 44 L.Ed. 998 (1900); *Home Ins. Co. v. New York*, 134 U.S. 594, 10 S.Ct. 593, 33 L.Ed. 1025 (1889); and held invalid in other instances, *Macallen v. Massachusetts*, 279 U.S. 620, 49 S.Ct. 432, 73 L.Ed. 874 (1929). Similar indirect attempts by the United States have also been sustained in some instances, *Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389 (1911); and held invalid in others, *National Life Ins. Co. v. U. S.*, 277 U.S. 508, 48 S.Ct. 591, 72 L.Ed. 968 (1928). See T. R. Powell, *The Macallen Case—and Before*, 8 Nat. Income Tax

Mag. 47 (1930); T. R. Powell, *The Macallen Case—and After*, 8 Nat. Income Tax Mag. 91 (1930); R. C. Brown, *Reduction of Tax Exemptions by Reason of Receipt of Tax Exempt Income*, 80 U.Pa.L.Rev. 534 (1932).

4. Neither the United States nor the states may so exercise their taxing power as to discriminate against the other; *Miller v. Milwaukee*, 272 U.S. 713, 47 S.Ct. 280, 71 L.Ed. 487 (1927); *National Life Ins. Co. v. U. S.*, *supra*, par. 4.

5. Congress can confer upon federal agencies and instrumentalities an immunity beyond that based on the principle of implied immunity from state taxation, *The Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 62 S.Ct. 1, 86 L.Ed. 65 (1941); and limit the scope of the implied immunity, *Baltimore Nat. Bank v. State Tax Comm. of Maryland*, 297 U.S. 209, 56 S.Ct. 417, 80 L.Ed. 586 (1936). See M. Spahr, *The Leave-It-To-Congress Trend in the Law of Tax Immunities*, 95 U.Pa.L.Rev. 1 (1946).

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## UNITED STATES v. PEOPLE OF STATE OF CALIFORNIA.

Supreme Court of the United States, 1936. 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567.

Mr. Justice STONE delivered the opinion of the Court.

This is a suit brought by the United States against the state of California in the District Court for Northern California to recover the statutory penalty of \$100 for violation of the Federal Safety Appliance Act, § 2, Act of March 2, 1893, c. 196, 27 Stat. 531, 45 U.S.C. § 2, 45 U.S.C.A. § 2, and section 6 of the act, as amended April 1, 1896, 29 Stat. 85, 45 U.S.C. § 6, 45 U.S.C.A. § 6.

The complaint alleges that California, in the operation of the state-owned State Belt Railroad, is a common carrier engaged in interstate transportation by railroad, and that it has violated the Safety Appliance Act by hauling over the road a car equipped with defective coupling apparatus. Upon the trial, without a jury, upon stipulated facts, the District Court gave judgment for the United States. The Court of Appeals for the Ninth Circuit reversed, 75 F.2d 41, on the ground that as exclusive jurisdiction of suits to which a state is a party is conferred upon this Court by section 233 of the Judicial Code, 36 Stat. 1156, 28 U.S.C. § 341, 28 U.S.C.A. § 341, the District Court was without jurisdiction of the cause. We granted certiorari, 296 U.S. 554, 56 S.Ct. 87, 80 L.Ed. 391, to review the case as one involving questions of public importance, upon a petition of the government which urged that the state is a common carrier by railroad, subject to the Safety Appliance Act, and, under its provisions, to suit in the District Court to recover penalties for violation of the act. \* \* \*

2. The state urges that it is not subject to the Federal Safety Appliance Act. It is not denied that the omission charged would be a violation if by a privately-owned rail carrier in interstate commerce. But it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement, see *Sherman v. United States*, supra, *Denning v. State*, 123 Cal. 316, 55 P. 1000, it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal act. In any case it is argued that the statute is not to be construed as applying to the state acting in that capacity.

Despite reliance upon the point both by the government and the state, we think it unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. See *Puget Sound Power & Light Co. v. City of Seattle*, 291 U.S. 619, 624, 54 S.Ct. 542, 78 L.Ed. 1025; *Green v. Frazier*, 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878; *Jones v. Portland*, 245 U.S. 217, 38 S.Ct. 112, 62 L.Ed. 252, L.R.A.1918C, 765, Ann.Cas. 1918E, 660. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. The power of a state to fix intrastate railroad rates must yield to the power of the national government when their regulation is appropriate to the regulation of interstate commerce. *United States v. Louisiana*, 290 U.S. 70, 74, 75, 54 S.Ct. 28, 78 L.Ed. 181; *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 371, 22 A.L.R. 1086; *Houston, E. & W. T. Ry. Co. v. United States (Shreveport Rate Cases)*, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341. A contract between a state and a rail carrier fixing intrastate rates is subject to regulation and control by Congress, acting within the commerce clause, Const.U.S. art. 1, § 8, cl. 3, U.S.C.A.Const. art. 1, § 8, cl. 3; *New York v. United States*, 257 U.S. 591, 42 S.Ct. 239, 66 L.Ed. 385, as are state agencies created to effect a public purpose, see *Sanitary District of Chicago v. United States*, 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352; *Board of Trustees v. United States*, 289 U.S. 48, 53 S.Ct. 509, 77 L.Ed. 1025; see *Georgia v. Chattanooga*, 264 U.S. 472, 44 S.Ct. 369, 68 L.Ed. 796. In each case the power of the state is subordinate to the constitutional exercise of the granted federal power.

The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 522-524, 46 S.Ct. 172, 70 L.Ed. 384, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. *Helvering v. Powers*, 293 U.S. 214, 225, 55 S.Ct. 171, 79 L.Ed. 291; *Ohio v. Helvering*, 292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307; *South Carolina v. United States*, 199 U.S. 437, 26 S.Ct. 110, 50 L.Ed. 261, 4 Ann.Cas. 737; see *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 173, 29 S.Ct. 458, 53 L.Ed. 742, explaining *South Carolina v. United States*, *supra*. Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. The Federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances, *Swinson v. Chicago, St. Paul, M. & O. Ry. Co.*, 294 U.S. 529, 55 S.Ct. 517, 79 L.Ed. 1041, 96 A.L.R. 1136, *Fairport, P. & E. R. Co. v. Meredith*, 292 U.S. 589, 594, 54 S.Ct. 826, 78 L.Ed. 1446, *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 17, 25 S.Ct. 158, 49 L.Ed. 363, and to safeguard interstate commerce itself from obstruction and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly intrastate. *Southern Ry. Co. v. United States*, 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72; *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 214, 54 S.Ct. 402, 78 L.Ed. 755. The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of

the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection.

In *Ohio v. Helvering*, supra, it was held that a state, upon engaging in the business, became subject to a federal statute imposing a tax on those dealing in intoxicating liquors, although states were not specifically mentioned in the statute. The same conclusion was reached in *South Carolina v. United States*, supra; and see *Helvering v. Powers*, supra. Similarly the Interstate Commerce Commission has regarded this and other state-owned interstate rail carriers as subject to its jurisdiction, although the Interstate Commerce Act does not in terms apply to state-owned rail carriers. See *California Canneries Co. v. Southern P. Co.*, 51 I.C.C. 500, 502, 503; *United States v. Belt Line R. Co.*, 56 I.C.C. 121; *Texas State Railroad*, 34 I.C.C., Val.R., 276.

Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it, see *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U.S. 152, 32 S.Ct. 457, 56 L.Ed. 706; *United States v. Herron*, 20 Wall. 251, 22 L.Ed. 275; *In re Fowble*, D.C., 213 F. 676. This rule has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. *United States v. Herron*, supra, 20 Wall. 251, 255, 22 L.Ed. 275; *Dollar Savings Bank v. United States*, 19 Wall. 227, 239, 22 L.Ed. 80. The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. See *Baltimore National Bank v. State Tax Commission of Maryland*, 297 U.S. 209, 56 S.Ct. 417, 80 L.Ed. 586, decided this day. We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial. It was disregarded in *Ohio v. Helvering*, supra, and *South Carolina v. United States*, supra. See *Heiner v. Colonial Trust Co.*, 275 U.S. 232, 234, 235, 48 S.Ct. 65, 72 L.Ed. 256. \* \* \*

Reversed.

## NOTE

1. A state university is not immune from paying import duties on equipment imported for use in the performance of its educational functions, *Board of Trustees of University of Illinois v. U. S.*, 289 U.S. 48, 53 S.Ct. 509, 77 L.Ed. 1025 (1933). See *S. Johnson, When the Importer is a State University—May the Federal Government Collect a Duty*, 27 Mich.L.Rev. 499 (1928).

2. Federal wartime price control may be validly applied to a state's sales of timber from its school lands, *Case v. Bowles*, 327 U.S. 92, 66 S.Ct. 438, 90 L.Ed. 552 (1946).

3. As to the power of United States to condemn lands owned by a state or a municipality thereof, see *Town of Nahant v. U. S.*, 136 F. 273 (C.C.A.Mass.1905); *U. S. v. Carmock*, 329 U.S. 230, 67 S.Ct. 252, 91 L.Ed. 209 (1946). A state has no power to authorize condemnation of federally owned land within it, *Utah Power & Light Co. v. U. S.*, 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed. 791 (1917).

4. Congress may, in connection with federal grants in aid to a state, impose conditions limiting political activity of state officials connected with expending such grants, and reduce amount of the aid for breach of such conditions, *Oklahoma v. U. S. Civil Service Commission*, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947).

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PENN DAIRIES, INC. v. MILK CONTROL COMMISSION OF  
THE COMMONWEALTH OF PENNSYLVANIA.

Supreme Court of the United States, 1943.  
318 U.S. 261, 63 S.Ct. 617, 87 L.Ed. 748.

Proceeding by the Milk Control Commission of the Commonwealth of Pennsylvania against Penn Dairies, Inc., on a citation to show cause why the defendant's application for a milk dealer's license should not be refused, wherein the United States of America intervened. From a judgment of the Supreme Court of Pennsylvania, 344 Pa. 635, 26 A.2d 431, affirming a judgment of the Superior Court, 148 Pa.Super. 261, 24 A.2d 717, affirming a judgment of the Court of Common Pleas of Lancaster County sustaining an order of the Commission denying the defendant's license application, the plaintiff and the intervener appeal.

Mr. Chief Justice STONE delivered the opinion of the Court.

Decision of this case turns on the question whether the minimum price regulations of the Pennsylvania Milk Control Law of April 28, 1937, P.L. 417, *Purdon's Pa.Stat.Ann.*, Tit. 31, § 700j—101 et seq., may constitutionally be applied to the sale of milk by a dealer to the United States, the sale being consummated within the territorial limits of the state in a place subject to its jurisdiction.

The Pennsylvania Milk Control Law establishes a milk control commission, § 201, with authority to fix prices for milk sold within the state wherever produced, §§ 801-803, including minimum wholesale and retail prices for milk sold by milk dealers to consumers, § 802, and to issue rules, regulations and orders to effectuate this authority, § 307.

In the fall of 1940 the United States established, under a permit from the Commonwealth of Pennsylvania, a military encampment on lands belonging to the Commonwealth. As is conceded, the permit involved no surrender of state jurisdiction or authority over the area occupied by the camp. On February 1, 1941, the purchasing and contracting officer at the encampment, an officer of the Quartermaster's Corps of the United States Army, invited bids for a supply of milk for the period from March 1 to June 30, 1941, for consumption by troops stationed at the camp. On February 4, the Milk Control Commission sent a notice to interested parties, including appellant, Penn Dairies, Inc., a Pennsylvania corporation, addressed to "all milk dealers interested in submitting bids to furnish milk to the United States Government" at the encampment. The notice was accompanied by the Commission's Official General Order No. A-14, § 4-B of which prescribed the "minimum wholesale prices to be charged by or paid to milk dealers". The notice announced that the unit prices specified for sales to institutions by that section of the order should be considered in the preparation of bids and that sales of milk at prices below the prescribed minima would be construed as violations of the milk control law. The dairy submitted a bid offering to sell milk in wholesale quantities at prices substantially below those prescribed by the Commission. Its bid was accepted by a War Department Purchase Order of March 1, 1941, the contract was awarded to it as the lowest bidder, and it performed the contract by deliveries of the milk at the contract price—all within the state.

On March 5, 1941, the Commission, pursuant to §§ 404 and 405 of the Milk Control Act, issued a citation to the dairy to show cause why its application for a milk dealer's license for the year beginning May 1, 1941, should not be denied because of its sale and delivery of the milk at prices below the minima fixed by the Commission's order. Section 404 makes the grant of a license mandatory save in circumstances not now material, but provides that the Commission may deny or cancel a license where the applicant or licensee "has violated any of the provisions of this act, or any of the rules, regulations or orders of the commission

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Appellants urge that the Pennsylvania Milk Control Act, as applied to a dealer selling to the United States, violates a constitutional immunity of the United States, and also conflicts with federal legislation regulating purchases by the United States and therefore cannot constitutionally apply to such purchases.

Appellants' first proposition proceeds on the assumption that local price regulations normally controlling milk dealers who carry on their business within the state, when applied to sales made to the government, so burden it or so conflict with the Constitution as to render the regulations unlawful. We may assume that Congress, in aid of its granted power to raise and support armies, Article I, § 8, cl. 12, and with the support of the supremacy clause, Article VI, cl. 2, could declare state regulations like the present inapplicable to sales to the government. \* \* \* But there is no clause of the Constitution which purports, unaided by Congressional enactment, to prohibit such regulations, and the question with which we are now concerned is whether such a prohibition is to be implied from the relationship of the two governments established by the Constitution.

We may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. \* \* \* But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions, \* \* \* and the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation. *State of Alabama v. King & Boozer*, 314 U.S. 1, 9, 62 S.Ct. 43, 45, 86 L.Ed. 3, 140 A.L.R. 615, and cases cited. \* \* \*

Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, *Penn Dairies, Inc., v. Milk Control Commission*, 148 Pa.Super. at page 270, 271, 24 A.2d 717. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforceable and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state,

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see *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032, 101 A.L.R. 55. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama v. King & Boozer*, *supra*; or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in *Baltimore & A. R. Co. v. Lichtenberg*, *supra*; or the local building regulations applied to a contractor engaged in constructing a postoffice building for the government, sustained in *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 60 S.Ct. 431, 84 L.Ed. 596, 127 A.L.R. 821.

The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see *Metcalf & Eddy v. Mitchell*, *supra*, 269 U.S. at page 523, 524, 46 S.Ct. at page 174, 70 L.Ed. 384. And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, see *Graves v. People of State of New York ex rel. O'Keefe*, 306 U.S. 466, 483, 487, 59 S.Ct. 595, 599, 601, 86 L.Ed. 927, 120 A.L.R. 1466.

Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require. *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, 312 U.S. 81, 61 S.Ct. 485, 85 L.Ed. 595, and cases cited; *Colorado Nat. Bank v.*

Bedford, 310 U.S. 41, 53, 60 S.Ct. 800, 805, 84 L.Ed. 1067, and cases cited; cf. *Baltimore Nat. Bank v. State Tax Commission*, 297 U.S. 209, 56 S.Ct. 417, 80 L.Ed. 586. Our inquiry here, therefore, must be whether the state's regulation of this contractor in a matter of local concern conflicts with Congressional legislation or with any discernible Congressional policy. \* \* \*

We are unable to find in Congressional legislation, either as read in the light of its history or as construed by the executive officers charged with the exercise of the contracting power, any disclosure of a purpose to immunize government contractors from local price-fixing regulations which would otherwise be applicable. Nor, in the circumstances of this case, can we find that the Constitution, unaided by Congressional enactment, confers such an immunity. It follows that the Pennsylvania courts rightly held that the Constitution and laws of the United States did not preclude the application of the Pennsylvania Milk Control Law to appellant Penn Dairies, Inc., by denial of its license application.

Affirmed.

Mr. Justice MURPHY concurred in a separate opinion.

Mr. Justice DOUGLAS dissented on the issue of the effect of Congressional legislation, concurred in by Justices BLACK and JACKSON.

#### NOTE

1. Const.U.S. art. 1, § 8, cl. 17, confers upon Congress exclusive legislative power over all places purchased by the United States, with the consent of the legislature of the state in which they are situated, for the erection of forts, magazines, arsenals, dockyards and other needful buildings. For cases construing this provision see *U. S. v. Unzenta*, 281 U.S. 138, 50 S.Ct. 284, 74 L.Ed. 761 (1930); *Pacific Coast Dairy, Inc., v. Department of Agriculture of California*, 318 U.S. 285, 63 S.Ct. 628, 87 L.Ed. 761 (1943); *S. R. A., Inc. v. Minnesota*, 327 U.S. 558, 66 S.Ct. 749, 90 L.Ed. 851 (1946).

2. As to the interactions of the federal government and a state in federally owned lands within the latter which the former acquired by other means than purchase with consent of state legislature, or acquired with such consent for purposes not includible within Const.U.S. art. 1, § 8, cl. 17, see *Arlington Hotel Co. v. Fant*, 278 U.S. 429, 49 S.Ct. 227, 73 L.Ed. 447 (1929); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938). *W. H. Pillsbury, Law Applicable to National Parks and Other Federal Reservations Within a State*, 22 Calif.L.Rev. 152 (1934); *H. R. Fields, Jurisdiction Over Nationally Owned Areas Within the States*, 24 Calif.L.Rev. 573 (1936).

3. The United States is the owner of the 3-mile marginal belt along at least a part of its coast, *U. S. v. California*, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947).

## ERIE R. Co. v. TOMPKINS.

Supreme Court of the United States, 1938. 304 U.S. 64, 58 S.Ct. 817  
82 L.Ed. 1188, 114 A.L.R. 1487.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved.

Tompkins, a citizen of Pennsylvania, was injured on a dark night by a passing freight train of the Erie Railroad Company while walking along its right of way at Hughestown in that state. He claimed that the accident occurred through negligence in the operation, or maintenance, of the train; that he was rightfully on the premises as licensee because on a commonly used beaten foot-path which ran for a short distance alongside the tracks; and that he was struck by something which looked like a door projecting from one of the moving cars. To enforce that claim he brought an action in the federal court for Southern New York, which had jurisdiction because the company is a corporation of that state. It denied liability; and the case was tried by a jury.

The Erie insisted that its duty to Tompkins was no greater than that owed to a trespasser. It contended, among other things, that its duty to Tompkins, and hence its liability, should be determined in accordance with the Pennsylvania law; that under the law of Pennsylvania, as declared by its highest court, persons who use pathways along the railroad right of way—that is, a longitudinal pathway as distinguished from a crossing—are to be deemed trespassers; and that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or willful. Tompkins denied that any such rule had been established by the decisions of the Pennsylvania courts; and contended that, since there was no statute of the state on the subject, the railroad's duty and liability is to be determined in federal courts as a matter of general law.

The trial judge refused to rule that the applicable law precluded recovery. The jury brought in a verdict of \$30,000; and the judgment entered thereon was affirmed by the Circuit Court of Appeals, which held (2 Cir., 90 F.2d 603, 604), that it was unnecessary to consider whether the law of Pennsylvania was as contended, because the question was one not of local, but of general, law, and that "upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. \* \* \* Where the public has made open and notorious use of a railroad right

of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. \* \* \* It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train."

The Erie had contended that application of the Pennsylvania rule was required, among other things, by section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U.S.C. § 725, 28 U.S.C.A. § 725, which provides: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari. 302 U.S. 671, 58 S.Ct. 50, 82 L. Ed. 518.

*First.* Swift v. Tyson, 16 Pet. 1, 18, 10 L.Ed. 865, held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the state is—or should be; and that, as there stated by Mr. Justice Story, "the true interpretation of the 34th section limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case."

The Court in applying the rule of section 34 to equity cases, in *Mason v. United States*, 260 U.S. 545, 559, 43 S.Ct. 200, 204, 67 L.Ed. 396, said: "The statute, however, is merely declarative of

the rule which would exist in the absence of the statute." The federal courts assumed, in the broad field of "general law," the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given section 34, and as to the soundness of the rule which it introduced. But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written.

Criticism of the doctrine became widespread after the decision of *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 48 S.Ct. 404, 72 L.Ed. 681, 57 A.L.R. 426. There, *Brown & Yellow*, a Kentucky corporation owned by Kentuckians, and the *Louisville & Nashville Railroad*, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at the Bowling Green, Ky., railroad station; and that the *Black & White*, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a contract would be void under the common law of Kentucky, it was arranged that the *Brown & Yellow* reincorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the federal court for Western Kentucky to enjoin competition by the *Black & White*; an injunction issued by the District Court was sustained by the Court of Appeals; and this Court, citing many decisions in which the doctrine of *Swift v. Tyson* had been applied, affirmed the decree.

*Second.* Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by noncitizens against citizens.

It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.

The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called "general law" as to which federal courts exercised an independent judgment. In addition to questions of purely commercial law, "general law" was held to include the obligations under contracts entered into and to be performed within the state, the extent to which a carrier operating within a state may stipulate for exemption from liability for his own negligence or that of his employee; the liability for torts committed within the state upon persons resident or property located there, even where the question of liability depended upon the scope of a property right conferred by the state; and the right to exemplary or punitive damages. Furthermore, state decisions construing local deeds, mineral conveyances, and even devises of real estate, were disregarded.

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own state and become citizens of another might avail themselves of the federal rule. And, without even change of residence, a corporate citizen of the state could avail itself of the federal rule by reincorporating under the laws of another state, as was done in the *Taxicab Case*.

The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so.

*Third.* Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And, whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no fed-

eral general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U.S. 368, 401, 13 S.Ct. 914, 927, 37 L.Ed. 772, against ignoring the Ohio common law of fellow-servant liability: I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence."

The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law":

"But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard

to what it may have been in England or anywhere else. \* \* \*

"The authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word."

Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." In disapproving that doctrine we do not hold unconstitutional section 34 of the Federal Judiciary Act of 1789, 28 U.S.C.A. § 725, or any other act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.

*Fourth.* The defendant contended that by the common law of Pennsylvania as declared by its highest court in *Falchetti v. Pennsylvania R. Co.*, 307 Pa. 203, 160 A. 859, the only duty owed to the plaintiff was to refrain from willful or wanton injury. The plaintiff denied that such is the Pennsylvania law. In support of their respective contentions the parties discussed and cited many decisions of the Supreme Court of the state. The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion.

Reversed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

Mr. Justice REED concurred in part. Messrs. Justices BUTLER and McREYNOLDS dissented.

#### NOTE

1. The principle of the reported case does not justify a federal court to dismiss a diversity case because of uncertainty as to the applicable state law, *Meredith v. City of Winter Haven*, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9 (1943).

2. The principle has been applied to equitable proceedings in federal diversity cases, *Guaranty Trust Co. of N. Y. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945); and been held to require federal courts in diversity cases to follow the conflicts of law rules of the state in which they sit, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Griffin v. McCoach*, 313 U.S. 498, 61 S.Ct. 1023, 85 L.Ed. 1481 (1941).

3. The principle does not apply to federally created rights, *Holmberg v. Ambrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946).

4. For cases considering problem of finding the state law, see *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 S.Ct. 176, 85 L.Ed. 109 (1940); *Vanderbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 61 S.Ct. 347, 85 L.Ed. 327 (1941); *King v. Order of United Commercial Travellers of America*, 333 U.S. 153, 68 S.Ct. 488, 92 L.Ed. — (1948).

5. See on the various aspects of the doctrine of the reported case *A. M. Dobie*, *Seven Implications of Swift v. Tyson*, 16 Va.L.Rev. 225 (1930); *J. C. Pritchard*, *The Constitutional Power and Relation of State and Federal Courts*, 18 Yale L.Jour. 165 (1908); *S. S. Stimson*, *Swift v. Tyson—What Remains*, 24 Cornell L.Quar. 54 (1938); Note, *Exceptions to Erie v. Tompkins; The Survival of Federal Common Law*, 59 Harv.L.Rev. 966 (1946); Note, *How a Federal Court Determines State Law*, 59 Harv.L.Rev. 1299 (1946); Note, *State Statutes Depriving State Courts of Jurisdiction as Affected by the Rule of Erie v. Tompkins*, 56 Yale L.Jour. 1037 (1947); *G. C. Rawlings, Jr.*, *Angel v. Bullington and Diversity Jurisdiction*, 33 Va.L. Rev. 739 (1947).

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### TESTA v. KATT.

Supreme Court of the United States, 1947.  
330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967, 172 A.L.R. 225.

Mr. Justice BLACK delivered the opinion of the Court.

Section 205(e) of the Emergency Price Control Act provides that a buyer of goods above the prescribed ceiling price may sue the seller "in any court of competent jurisdiction" for not more than three times the amount of the overcharge plus costs and a reasonable attorney's fee. Section 205(c) provides that federal district courts shall have jurisdiction of such suits "concurrently with State and Territorial courts." Such a suit under § 205(e) must be brought "in the district or county in which the defendant resides or has a place of business \* \* \*."

The respondent was in the automobile business in Providence, Providence County, Rhode Island. In 1944 he sold an automobile to petitioner Testa, who also resides in Providence, for \$1100, \$210 above the ceiling price. The petitioner later filed this suit against respondent in the State District Court in Providence. Recovery was sought under § 205(e). The court awarded a judgment of treble damages and costs to petitioner. On appeal to the State Superior Court, where the trial was de novo, the petitioner was again awarded judgment, but only for the amount of the overcharge plus attorney's fees. Pending appeal from this judgment, the Price Administrator was allowed to intervene. On appeal, the State Supreme Court reversed, 71 R.I. 472, 47 A.2d 312. It interpreted § 205(e) to be "a penal statute in the international sense." It held that an action for

violation of § 205(e) could not be maintained in the courts of that State. The State Supreme Court rested its holding on its earlier decision in *Robinson v. Norato*, 1945, 71 R.I. 256, 43 A.2d 467, 468, 162 A.L.R. 362 in which it had reasoned that: A state need not enforce the penal laws of a government which is "foreign in the international sense"; § 205(e) is treated by Rhode Island as penal in that sense; the United States is "foreign" to the State in the "private international" as distinguished from the "public international" sense; hence Rhode Island courts, though their jurisdiction is adequate to enforce similar Rhode Island "penal" statutes, need not enforce § 205(e). Whether state courts may decline to enforce federal laws on these grounds is a question of great importance. For this reason, and because the Rhode Island Supreme Court's holding was alleged to conflict with this Court's previous holding in *Mondou v. New York, N. H. & H. R. Co.*, 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327, 38 L.R.A.,N.S., 44, we granted certiorari. 67 S.Ct. 122.

For the purposes of this case, we assume, without deciding, that § 205(e) is a penal statute in the "public international," "private international," or any other sense. So far as the question of whether the Rhode Island courts properly declined to try this action, it makes no difference into which of these categories the Rhode Island court chose to place the statute which Congress has passed. For we cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country. Such a broad assumption flies in the face of the fact that the States of the Union constitute a nation. It disregards the purpose and effect of Article VI, § 2 of the Constitution which provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It cannot be assumed, the supremacy clause considered, that the responsibilities of a state to enforce the laws of a sister state are identical with its responsibilities to enforce federal laws. Such an assumption represents an erroneous evaluation of the statutes of Congress and the prior decisions of this Court in their historic setting. Those decisions establish that state courts do not bear the same relation to the United States that they do to foreign countries. The first Congress that convened

after the Constitution was adopted conferred jurisdiction upon the state courts to enforce important federal civil laws, and succeeding Congresses conferred on the states jurisdiction over federal crimes and actions for penalties and forfeitures.

Enforcement of federal laws by state courts did not go unchallenged. Violent public controversies existed throughout the first part of the Nineteenth Century until the 1860's concerning the extent of the constitutional supremacy of the Federal Government. During that period there were instances in which this Court and state courts broadly questioned the power and duty of state courts to exercise their jurisdiction to enforce United States civil and penal statutes or the power of the Federal Government to require them to do so. But after the fundamental issues over the extent of federal supremacy had been resolved by war, this Court took occasion in 1876 to review the phase of the controversy concerning the relationship of state courts to the Federal Government. *Clafin v. Houseman*, 93 U.S. 130, 23 L.Ed. 833. The opinion of a unanimous court in that case was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, "anything in the Constitution or Laws of any State to the contrary notwithstanding." It asserted that the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide. And the Court stated that "If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court." *Id.* 93 U.S. at page 137, 23 L.Ed. 833. And see *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 479, 56 S.Ct. 343, 348, 80 L.Ed. 331.

The *Clafin* opinion thus answered most of the arguments theretofore advanced against the power and duty of state courts to enforce federal penal laws. And since that decision, the remaining areas of doubt have been steadily narrowed. There have been statements in cases concerned with the obligation of states to give full faith and credit to the proceedings of sister states which suggested a theory contrary to that pronounced in the *Clafin* opinion. But when in *Mondou v. New York, N. H. & H. R. Co.*, *supra*, this Court was presented with a case testing the power and duty of states to enforce federal laws, it found the

solution in the broad principles announced in the Claflin opinion.

The precise question in the Mondou case was whether rights arising under the Federal Employers' Liability Act, 36 Stat. 291, 45 U.S.C.A. § 51 et seq., could "be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion. \* \* \*" Id. 223 U.S. at page 46, 32 S.Ct. at page 177, 56 L.Ed. 327, 38 L.R.A.,N.S., 44. The Supreme Court of Connecticut had decided that they could not. Except for the penalty feature, the factors it considered and its reasoning were strikingly similar to that on which the Rhode Island Supreme Court declined to enforce the federal law here involved. But this Court held that the Connecticut court could not decline to entertain the action. The contention that enforcement of the congressionally created right was contrary to Connecticut policy was answered as follows:

"The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state." *Mondou v. New York, N. H. & H. R. Co.*, supra, 223 U.S. at page 57, 32 S.Ct. at page 178, 56 L.Ed. 327, 38 L.R.A.,N.S., 44.

So here, the fact that Rhode Island has an established policy against enforcement by its courts of statutes of other states and the United States which it deems penal, cannot be accepted as a "valid excuse." Cf. *Douglas v. New York, N. H. & H. R. Co.*, 279 U.S. 377, 388, 49 S.Ct. 355, 356, 73 L.Ed. 747. For the policy of the federal Act is the prevailing policy in every state. Thus, in a case which chiefly relied upon the Claflin and Mondou precedents, this Court stated that a state court cannot "refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers." *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211, 222, 36 S.Ct. 595, 598, 60 L.Ed. 961, L.R.A.1917A, 86, Ann.Cas.1916E, 505.

The Rhode Island court in its Robinson decision on which it relies cites cases of this Court which have held that states are

not required by the full faith and credit clause of the Constitution to enforce judgments of the courts of other states based on claims arising out of penal statutes. But those holdings have no relevance here, for this case raises no full faith and credit question. Nor need we consider in this case prior decisions to the effect that federal courts are not required to enforce state penal laws. Compare *State of Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 8 S.Ct. 1370, 32 L.Ed. 239, with *Commonwealth of Massachusetts v. State of Missouri*, 308 U.S. 1, 20, 60 S.Ct. 39, 44, 84 L.Ed. 1. For whatever consideration they may be entitled in the field in which they are relevant, those decisions did not bring before us our instant problem of the effect of the supremacy clause on the relation of federal laws to state courts. Our question concerns only the right of a state to deny enforcement to claims growing out of a valid federal law.

It is conceded that this same type of claim arising under Rhode Island law would be enforced by that State's courts. Its courts have enforced claims for double damages growing out of the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq. Thus the Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action. Under these circumstances the State courts are not free to refuse enforcement of petitioners' claim. See *McKnett v. St. Louis & S. F. R. Co.*, 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227; and compare *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789; *Id.*, 325 U.S. 77, 65 S.Ct. 954, 89 L.Ed. 1483. The case is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed.

## CHAPTER 5

### INTERSTATE RELATIONS

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#### BLAKE v. McCLUNG.

Supreme Court of United States, 1898. 172 U.S. 239, 19 S.Ct. 165,  
43 L.Ed. 432.

[Error to the Supreme Court of Tennessee. The Embreeville Company, a British corporation, had complied with the provisions of the statute stated in the opinion below, and did business in Tennessee. The company became insolvent, and, upon a creditors' bill filed by McClung and others, a receiver was appointed who administered the assets. The chancery court entered a decree adjudicating that the creditors who were residents of Tennessee were, under the aforesaid statute, entitled to priority in the distribution of assets as against all creditors resident out of the state, whether citizens of other states or not. This was affirmed by the state Supreme Court, and a writ of error was taken by Blake and others, citizens of Ohio, and by the Hull Coal Company, a Virginia corporation, all of whom were creditors of the Embreeville Company.]

Mr. Justice HARLAN. \* \* \* The plaintiffs in error contend that the judgment of the state court, based upon the statute, denies to them rights secured by the second section of the fourth article of the Constitution of the United States, U.S.C.A.Const. art. 4, providing that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."  
\* \* \*

We have seen that, by the third section of the Tennessee statute, corporations organized under the laws of other states or countries, and which complied with the provisions of the statute, were to be deemed and taken to be corporations of that state; and by the fifth section it is declared, in respect of the property of corporations doing business in Tennessee under the provisions of the statute, that creditors who are residents of that state shall have a priority in the distribution of assets, or the subjection of the same, or any part thereof, to the payment of debts, over all simple contract creditors, being residents of any other country or countries.

The suggestion is made that, as the statute refers only to "residents," there is no occasion to consider whether it is repugnant to the provision of the national Constitution relating to citizens. We cannot accede to this view. \* \* \* Looking at the purpose and scope of the Tennessee statute, it is plain that the words "residents of this state" refer to those whose residence in Tennessee was such as indicated that their permanent home or habitation was there, without any present intention of removing therefrom, and having the intention, when absent from that state, to return thereto,—such residence as appertained to or inhered in citizenship. And the words, in the same statute, "residents of any other country or countries," refer to those whose respective habitations were not in Tennessee, but who were citizens, not simply residents, of some other state or country. It is impossible to believe that the statute was intended to apply to creditors of whom it could be said that they were only residents of other states, but not to creditors who were citizens of such states. The state did not intend to place creditors, citizens of other states, upon an equality with creditors, citizens of Tennessee, and to give priority only to Tennessee creditors over creditors who resided in, but were not citizens of, other states. The manifest purpose was to give to all Tennessee creditors priority over all creditors residing out of that state, whether the latter were citizens or only residents of some other state or country. Any other interpretation of the statute would defeat the object for which it was enacted. \* \* \*

Beyond question, a state may, through judicial proceedings, take possession of the assets of an insolvent foreign corporation within its limits, and distribute such assets or their proceeds among creditors according to their respective rights. But may it exclude citizens of other states from such distribution until the claims of its own citizens shall have been first satisfied? In the administration of the property of an insolvent foreign corporation by the courts of the state in which it is doing business, will the Constitution of the United States permit discrimination against individual creditors of such corporation because of their being citizens of other states, and not citizens of the state in which such administration occurs?

These questions are presented for our determination. Let us see how far they have been answered by the former decisions of this court.

This court has never undertaken to give any exact or comprehensive definition of the words "privileges and immunities," in article 4 of the Constitution of the United States. Referring to this clause, Mr. Justice Curtis, speaking for the court in *Conner v. Elliot*, 18 How. 591, 593, 15 L.Ed. 497, said: "We do not deem

it needful to attempt to define the meaning of the word 'privileges' in this clause of the Constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief." Nevertheless, what has been said by this and other courts upon the general subject will assist us in determining the particular questions now pressed upon our attention.

One of the leading cases in which the general question has been examined is *Corfield v. Coryell*, 4 Wash.C.C. 371, 380, Fed.Cas. No. 3,230, decided by Mr. Justice Washington at the circuit. He said: "The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature fundamental; which belong, of right, to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety,—subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or to reside in any other state for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state,—may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental, to which may be added the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state in every other state was manifestly calculated (to use the expression of the preamble to the corresponding provision in the

old articles of confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.' "

These observations of Mr. Justice Washington were made in a case involving the validity of a statute of New Jersey regulating the taking of oysters and shells on banks or beds within that state, and which excluded inhabitants and residents of other states from the privilege of taking or gathering clams, oysters, or shells on any of the rivers, bays, or waters in New Jersey, not wholly owned by some person residing in the state. The statute was sustained upon the ground that it only regulated the use of the common property of the citizens of New Jersey, which could not be enjoyed by others without the tacit consent or the express permission of the sovereign having the power to regulate its use. The court said: "The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states from taking them, except under such limitations and restrictions as the laws may prescribe."

In *Paul v. Virginia*, 8 Wall. 168, 180, 19 L.Ed. 357, the court observed that "it was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. *Lemmon v. People*, 20 N.Y. 607. Indeed, without some provision of the kind, removing from the citizens of each state the disabilities of alienage in the other states, and giving them equality of privilege with citizens of those states, the republic would have constituted little more than a league of states; it would not have constituted the Union which now exists."

*Ward v. Maryland*, 12 Wall. 418, 430, 20 L.Ed. 449, involved the validity of a statute of Maryland requiring all traders, not being permanent residents of the state, to take out licenses for the sale of goods, wares, or merchandise in Maryland, other than agricultural products and articles there manufactured. This

court said: "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union, for the purpose of engaging in lawful commerce, trade, or business, without molestation, to acquire personal property, to take and hold real estate, to maintain actions in the courts of the states, and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens. Comprehensive as the power of the states is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and, inasmuch as the Constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, it follows that the defendant might lawfully sell or offer or expose for sale within the district described in the indictment, any goods which the permanent residents of the state might sell or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents."

In the *Slaughter-House Cases*, 16 Wall. 36, 77, 21 L.Ed. 394, the court, referring to what was said in *Paul v. Virginia*, above cited, in reference to the scope and meaning of section 2 of article 4 of the Constitution, U.S.C.A.Const. art. 4, § 2, said: "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

In *Cole v. Cunningham*, 133 U.S. 107, 113, 114, 10 S.Ct. 271, 33 L.Ed. 538, this court cited with approval the language of Justice Story, in his *Commentaries on the Constitution*, to the effect that the object of the constitutional guaranty was to confer on the citizens of the several states "a general citizenship, and to communicate all the privileges and immunities which the citizens

of the same state would be entitled to under like circumstances, and this includes the right to institute actions."

These principles have not been modified by any subsequent decision of this court.

The foundation upon which the above cases rest cannot, however, stand, if it be adjudged to be in the power of one state, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges connected with that business which it denies to citizens of other states. By the statute in question the British company was to be deemed and taken to be a corporation of Tennessee, with authority to carry on its business in that state. It was the right of citizens of Tennessee to deal with it, as it was their right to deal with corporations created by Tennessee. And it was equally the right of citizens of other states to deal with that corporation. The state did not assume to declare, even if it could legally have declared, that that company, being admitted to do business in Tennessee, should transact business only with citizens of Tennessee, or should not transact business with citizens of other states. No one would question the right of the individual plaintiffs in error, although not residents of Tennessee, to sell their goods to that corporation upon such terms in respect of payment as might be agreed upon, and to ship them to the corporation at its place of business in that state.

But the enjoyment of these rights is materially obstructed by the statute in question; for that statute, by its necessary operation, excludes citizens of other states from transacting business with that corporation upon terms of equality with citizens of Tennessee. By force of the statute alone, citizens of other states, if they contracted at all with the British corporation, must have done so subject to the onerous condition that, if the corporation became insolvent, its assets in Tennessee should first be applied to meet its obligations to residents of that state, although liability for its debts and engagements was "to be enforced in the manner provided by law for the application of the property of natural persons to the payment of their debts, engagements, and contracts." But, clearly, the state could not in that mode secure exclusive privileges to its own citizens in matters of business. If a state should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that state over the claims of individual creditors citizens of other states, such legislation would be repugnant to the Constitution, upon the ground that it withheld from citizens of other states, as such, and because they were such, privileges granted to citizens of the state enacting it.

Can a different principle apply, as between individual citizens of the several states, when the assets to be distributed are the assets of an insolvent private corporation lawfully engaged in business, and having the power to contract with citizens residing in states other than the one in which it is located? \* \* \*

We hold such discrimination against citizens of other states to be repugnant to the second section of the fourth article of the Constitution of the United States, although, generally speaking, the state has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several states by the supreme law of the land. Indeed, all the powers possessed by a state must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States. \* \* \*

We must not be understood as saying that a citizen of one state is entitled to enjoy in another state every privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a state to its own people, in which citizens of other states may not participate, except in conformity to such reasonable regulations as may be established by the state. For instance, a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people; but it may require a nonresident, although a citizen of another state, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. So, a state may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time before a citizen of another state, who becomes a resident thereof, shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each state of the privileges and immunities secured by the Constitution to citizens of the several states. The Constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the government of the Union was ordained and established.

Nor must we be understood as saying that a state may not, by its courts, retain within its limits the assets of a foreign corpora-

tion, in order that justice may be done to its own citizens, nor, by appropriate action of its judicial tribunals, see to it that its own citizens are not unjustly discriminated against by reason of the administration in other states of the assets there of an insolvent corporation doing business within its limits. For instance, if the Embreeville Company had property in Virginia at the time of its insolvency, the Tennessee court administering its assets in that state could take into account what a Virginia creditor, seeking to participate in the distribution of the company's assets in Tennessee, had received or would receive from the company's assets in Virginia, and make such order touching the assets of the company in Tennessee, as would protect Tennessee creditors against wrongful discrimination arising from the particular action taken in Virginia for the benefit of creditors residing in that commonwealth.

It may be appropriate to observe that the objections to the statute of Tennessee do not necessarily embrace enactments that are found in some of the states requiring foreign insurance corporations, as a condition of their coming into the state for purposes of business, to deposit with the state treasurer funds sufficient to secure policy holders in its midst. Legislation of that character does not present any question of discrimination against citizens forbidden by the Constitution. Insurance funds set apart in advance for the benefit of home policy holders of a foreign insurance company doing business in the state are a trust fund of a specific kind, to be administered for the exclusive benefit of certain persons. Policy holders in other states know that those particular funds are segregated from the mass of property owned by the company, and that they cannot look to them to the prejudice of those for whose special benefit they were deposited. The present case is not one of that kind. The statute of Tennessee did not make it a condition of the right of the British corporation to come into Tennessee for purposes of business that it should, at the outset, deposit with the state a fixed amount, to stand exclusively or primarily for the protection of its Tennessee creditors. \* \* \*

We adjudge that when the general property and assets of a private corporation lawfully doing business in a state are in course of administration by the courts of such state, creditors who are citizens of other states are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such state, and cannot be denied equality of right simply because they do not reside in that state, but are citizens residing in other states of the Union. The individual plaintiffs in error were entitled to contract with this British corporation, lawfully doing business in Tennessee,

and deemed and taken to be a corporation of that state; and no rule in the distribution of its assets among creditors could be applied to them as resident citizens of Ohio, and because they were not residents of Tennessee, that was not applied by the courts of Tennessee to creditors of like character who were citizens of Tennessee.

As to the plaintiff in error, the Hull Coal & Coke Company of Virginia, different considerations must govern our decision. It has long been settled that, for purposes of suit by or against it in the courts of the United States, the members of a corporation are to be conclusively presumed to be citizens of the state creating such corporation (*Railroad Co. v. Letson*, 2 How. 497, 11 L. Ed. 353; *Drawbridge Co. v. Shepherd*, 20 How. 227, 232, 15 L. Ed. 896; *Railroad Co. v. Wheeler*, 1 Black, 286, 296, 17 L. Ed. 130; *Steamship Co. v. Tugman*, 106 U.S. 118, 120, 1 S. Ct. 53, 27 L. Ed. 87; *Steamship Co. v. Kane*, 170 U.S. 100, 111, 18 S. Ct. 526, 42 L. Ed. 964); and therefore it has been said that a corporation is to be deemed, for such purposes, a citizen of the state under whose laws it was organized. But it is equally well settled, and we now hold, that a corporation is not a citizen within the meaning of the constitutional provision that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." *Paul v. Virginia*, 8 Wall. 168, 178, 179, 19 L. Ed. 357; *Ducat v. Chicago*, 10 Wall. 410, 415, 19 L. Ed. 972; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 573, 19 L. Ed. 1029. The Virginia corporation, therefore, cannot invoke that provision for protection against the decree of the state court denying its right to participate upon terms of equality with Tennessee creditors in the distribution of the assets of the British corporation in the hands of the Tennessee court. \* \* \*

Judgment accordingly.

[BREWER, J., gave a dissenting opinion, in which FULLER, C. J., concurred, on the ground that the Tennessee statute discriminated, not against non-citizens, but against non-residents of the state.]

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#### NOTE

1. A corporation is not a citizen within the meaning of Const. U.S. art. 4, § 2, cl. 1, *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357 (1869). A business trust which is treated as an entity similar to a corporation by the state under whose laws it exists may be so treated by any other state for purposes of the interstate privileges clause, *Hemphill v. Orloff*, 277 U.S. 537, 48 S. Ct. 577, 72 L. Ed. 978 (1928). See Note, Constitutional Laws—Massachusetts Trust as Corporation or Citizen, 14 Cornell L. Quar. 70 (1928).

2. The provision imposes no limits on a state in dealing with its own citizens or aliens, *Bradwell v. Illinois*, 16 Wall. 130, 21 L.Ed. 442 (1873); *In re Johnson's Estate*, 139 Cal. 532, 73 P. 424 (1903).

3. The Supreme Court has consistently avoided resort to definitions that would limit its discretion in determining what interests of citizens of other states are protected by the interstate privileges clause. It has held that a state may grant its citizens preferences, and even exclude citizens of other states completely, with respect to certain interests and relations with it; see *Corfield v. Coryell*, Fed. Cas. 3230 (1825); *McCready v. Va.*, 94 U.S. 391, 24 L.Ed. 248 (1877); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 28 S.Ct. 529, 52 L.Ed. 828 (1908).

The *McCready* case is distinguished in *Toomer v. Witsell*, — U.S. —, 68 S.Ct. 1156, 92 L.Ed. — (1948), in which a South Carolina statute requiring nonresident shrimpers fishing within the three-mile maritime belt off its coast to pay boat license fees of \$2,500 as against a residents' fee of \$25, was held violative of the interstate privileges and immunities clause.

4. While the interstate privilege clause prohibits a state from discriminating against citizens of other states in favor of its own citizens, many of the cases deal with legislation which in terms discriminates between residents and non-residents. This is sometimes deemed equivalent to discrimination between citizens and citizens of other states, *Chalker v. Birmingham and N. W. Ry. Co.*, 249 U.S. 522, 39 S.Ct. 366, 63 L.Ed. 748 (1919); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920); at other times it is held to be not equivalent to a classification based on citizenship, *La Tourette v. McMaster*, 248 U.S. 465, 39 S.Ct. 160, 63 L.Ed. 362 (1919).

5. See W. J. Meyers, *The Privileges and Immunities of Citizens in the Several States*, 1 Mich.L.Rev. 286, 364 (1903); Note, *Discrimination Between Resident and Non-Resident Creditors in the Distribution of the Assets of an Insolvent Debtor*, 87 U.Pa.L.Rev. 328 (1939).

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### CANADIAN NORTHERN RY. CO. v. EGGEN.

Supreme Court of the United States, 1920. 252 U.S. 553, 40 S.Ct. 402,  
64 L.Ed. 713.

[On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.]

Mr. Justice CLARKE. The only question presented for decision in this case is as to the validity of section 7709 of the Statutes of Minnesota (General Statutes of Minnesota 1913), which reads:

"When a cause of action has arisen outside of this state, and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued." The Circuit Court of Appeals, reversing the District Court, held this statute invalid for the reason that the exemption in favor of citizens of Minnesota rendered it repugnant to article 4, section 2, of the Constitution of the United States, U.S.C.A.Const. art. 4, § 2, which declares that—"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." \* \* \*

This court has never attempted to formulate a comprehensive list of the rights included within the "privileges and immunities" clause of the Constitution (article 4, § 2), but it has repeatedly approved as authoritative the statement by Mr. Justice Washington, in 1825, in *Corfield v. Coryell*, 4 Wash.C.C. 371, 380, Fed. Cas.No.3,230 (the first federal case in which this clause was considered), saying: "We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental." *Slaughter-House Cases*, 16 Wall. 36, 75, 21 L.Ed. 394; *Blake v. McClung*, 172 U.S. 239, 248, 19 S.Ct. 165, 43 L.Ed. 432; *Chambers v. Baltimore & Ohio R. R. Co.*, 207 U.S. 142, 155, 28 S.Ct. 34, 52 L.Ed. 143.

In the *Corfield Case* the court included in a partial list of such fundamental privileges "the right of a citizen of one state \* \* to institute and maintain actions of any kind in the courts of" another.

The state of Minnesota, in the statute we are considering, recognized this right of citizens of other states to institute and maintain suits in its courts as a fundamental right, protected by the Constitution, and for one year from the time his cause of action accrued the respondent was given all of the rights which citizens of Minnesota had under it. The discrimination of which he complains could arise only from his own neglect. \* \* \*

From very early in our history, requirements have been imposed upon nonresidents in many, perhaps in all, of the states as a condition of resorting to their courts, which have not been imposed upon resident citizens. For instance, security for costs has very generally been required of a nonresident, but not of a resident citizen, and a nonresident's property in many states may be attached under conditions which would not justify the attaching of a resident citizen's property. This court has said of such requirements: "Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. \* \* \* It has never been supposed that regulations of that character materially interfered

with the enjoyment by citizens of each state of the privileges and immunities secured by the Constitution to citizens of the several states." *Blake v. McClung*, 172 U.S. 239, 256, 19 S.Ct. 165, 172, 43 L.Ed. 432.

The principle on which this holding rests is that the constitutional requirement is satisfied if the nonresident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms. A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.

This is the principle on which this court has repeatedly ruled that contracts were not impaired in a constitutional sense by change in limitation statutes which reduced the time for commencing actions upon them, provided a reasonable time was given for commencing suit before the new bar took effect. *Sohn v. Waterson*, 17 Wall. 596, 21 L.Ed. 737; *Terry v. Anderson*, 95 U.S. 628, 632, 24 L.Ed. 365; *Tennessee v. Sneed*, 96 U.S. 69, 74, 24 L.Ed. 610; *Antoni v. Greenhow*, 107 U.S. 769, 774, 2 S.Ct. 91, 27 L.Ed. 468.

A like result to that which we are announcing was reached with respect to similar statutes, in *Chemung Canal Bank v. Lowery*, 93 U.S. 72, 23 L.Ed. 806; by the Circuit Court of Appeals, Second Circuit, in *Aultman & Taylor Co. v. Syme*, 79 F. 238, 24 C.C.A. 539; in *Klotz v. Angle*, 220 N.Y. 347, 116 N.E. 24; and in *Robinson v. Oceanic Steam Navigation Co.*, 112 N.Y. 315, 325, 19 N.E. 625, 627, 2 L.R.A. 636.

In this last case the Court of Appeals of New York pertinently says: "A construction of the constitutional limitation [the one we are considering] which would apply it to such a case as this would strike down a large body of laws which have existed in all the states from the foundation of the government, making some discrimination between residents and nonresidents in legal proceedings and other matters."

The laws of Minnesota gave to the nonresident respondent free access to its courts, for the purpose of enforcing any right which he may have had, for a year—as long a time as was given him for that purpose by the laws under which he chose to live and work—and having neglected to avail himself of that law, he may not successfully complain because his expired right to maintain suit

elsewhere is not revived for his benefit by the laws of the state to which he went for the sole purpose of prosecuting his suit. The privilege extended to him for enforcing his claim was reasonably sufficient and adequate and the statute is a valid law. \* \*

Reversed.

### NOTE

1. For other cases considering the extent to which the interstate privileges and immunities clause constitutes a limitation on a state's power to define the jurisdiction of its courts, see *Chambers v. B. & O. R. R. Co.*, 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907); *Chemung Canal Bank v. Lowery*, 93 U.S. 72, 23 L.Ed. 806 (1876); *Douglas v. N. Y., N. H. & H. R. R. Co.*, 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747 (1929).

2. See Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col.L.Rev. 1 (1929); Note, *Courts—Discretion to Dismiss Actions Between Non-Residents on Causes of Action Arising Outside the State*, 15 Minn.L.Rev. 83 (1930); E. L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 Calif. L.Rev. 380 (1947).

3. The principles governing access of the citizens of other states to a state's courts have been extended to access to administrative tribunals empowered to grant awards under workmen's compensation acts, *Quong Ham Wah Co. v. Industrial Accident Commission*, 184 Cal. 26, 192 P. 1021 (1920).

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### TRAVIS v. YALE & TOWNE MFG. CO.

Supreme Court of the United States, 1920. 252 U.S. 60, 40 S.Ct. 223, 64 L.Ed. 460.

Mr. Justice PITNEY delivered the opinion of the Court.

This was a suit in equity, brought in the District Court by appellee against appellant as comptroller of the state of New York to obtain an injunction restraining the enforcement of the Income Tax Law of that state (chapter 627, Laws 1919) as against complainant, upon the ground of its repugnance to the Constitution of the United States because violating the interstate commerce clause, impairing the obligation of contracts, depriving citizens of the states of Connecticut and New Jersey employed by complainant of the privileges and immunities enjoyed by citizens of the state of New York, depriving complainant and its nonresident employés of their property without due process of law, and denying to such employés the equal protection of the laws. A motion to dismiss the bill—equivalent

to a demurrer—was denied upon the ground that the act violated section 2 of article 4 of the Constitution, U.S.C.A.Const. art. 4, § 2 by discriminating against nonresidents in the exemptions allowed from taxable income; an answer was filed, raising no question of fact; in due course there was a final decree in favor of complainant; and defendant took an appeal to this court under section 238, Judicial Code, 28 U.S.C.A. § 345.

The act (section 351) imposes an annual tax upon every resident of the state with respect to his net income as defined in the act. \* \* \*

The District Court, not passing upon the above questions, held that the act, in granting to residents exemptions denied to nonresidents, violated the provision of section 2 of article 4 of the federal Constitution, U.S.C.A.Const. art. 4, § 2:

“The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”

And, notwithstanding the elaborate and ingenious argument submitted by appellant to the contrary, we are constrained to affirm the ruling.

The purpose of the provision came under consideration in *Paul v. Virginia*, 8 Wall. 168, 180, 19 L.Ed. 357, where the court, speaking by Mr. Justice Field, said:

“It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.”

And in *Ward v. Maryland*, 12 Wall. 418, 430, 20 L.Ed. 449, holding a discriminatory state tax upon nonresident traders to be void, the court, by Mr. Justice Clifford, said:

“Beyond doubt those words [privileges and immunities] are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire per-

sonal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens."

Of course the terms "resident" and "citizen" are not synonymous, and in some cases the distinction is important (*La Tourette v. McMaster*, 248 U.S. 465, 470, 39 S.Ct. 160, 63 L.Ed. 362); but a general taxing scheme such as the one under consideration, if it discriminates against all nonresidents, has the necessary effect of including in the discrimination those who are citizens of other states; and, if there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled. In *Blake v. McClung*, 172 U.S. 239, 247, 19 S.Ct. 165, 43 L.Ed. 432, and 176 U.S. 59, 67, 20 S.Ct. 307, 44 L.Ed. 371, the court held that a statute of Tennessee, declaring the terms upon which a foreign corporation might carry on business and hold property in that state, which gave to its creditors residing in Tennessee priority over all creditors residing elsewhere, without special reference to whether they were citizens or not, must be regarded as contravening the "privileges and immunities" clause.

The nature and effect of the crucial discrimination in the present case are manifest. Section 362, in the case of residents, exempts from taxation \$1,000 of the income of a single person, \$2,000 in the case of a married person, and \$200 additional for each dependent. A nonresident taxpayer has no similar exemption; but by section 363, if liable to an income tax in his own state, including income derived from sources within New York and subject to taxation under this act, he is entitled to a credit upon the income tax otherwise payable to the state of New York by the same proportion of the tax payable to the state of his residence as his income subject to taxation by the New York act bears to his entire income taxed in his own state:

"Provided, that such credit shall be allowed only if the laws of said state \* \* \* grant a substantially similar credit to residents of this state subject to income tax under such laws."

In the concrete, the particular incidence of the discrimination is upon citizens of Connecticut and New Jersey, neither of which states has an income tax law. A considerable number of complainant's employés, residents and citizens of one or the other of those states, spend their working time at its office in the city of New York, and earn their salaries there. The case is typical; it being a matter of common knowledge that from necessity, due to the geographical situation of that city, in close proximity to the neighboring states, many thousands of men and women,

residents and citizens of those states, go daily from their homes to the city and earn their livelihood there. They pursue their several occupations side by side with residents of the state of New York—in effect competing with them as to wages, salaries, and other terms of employment. Whether they must pay a tax upon the first \$1,000 or \$2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference. Under the circumstances as disclosed, we are unable to find adequate ground for the discrimination, and are constrained to hold that it is an unwarranted denial to the citizens of Connecticut and New Jersey of the privileges and immunities enjoyed by citizens of New York. This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer (see *Amoskeag Savings Bank v. Purdy*, 231 U.S. 373, 393–394, 34 S.Ct. 114, 58 L.Ed. 274; *Maxwell v. Bugbee*, 250 U.S. 525, 543, 40 S.Ct. 2, 63 L.Ed. 1124); but a general rule, operating to the disadvantage of all nonresidents including those who are citizens of the neighboring states, and favoring all residents including those who are citizens of the taxing state.

It cannot be deemed to be counter-balanced by the provision of paragraph 3 of section 359, which excludes from the income of nonresident taxpayers—"annuities, interest on bank deposits, interest on bonds, notes, or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article."

This provision is not so conditioned as probably to benefit nonresidents to a degree corresponding to the discrimination against them; it seems to have been designed rather (as is avowed in appellant's brief) to preserve the pre-eminence of New York City as a financial center.

Nor can the discrimination be upheld, as is attempted to be done, upon the theory that nonresidents have untaxed income derived from sources in their home states or elsewhere outside of the state of New York, corresponding to the amount upon which residents of that state are exempt from taxation under this act. The discrimination is not conditioned upon the existence of such untaxed income; and it would be rash to assume that nonresidents taxable in New York under this law, as a class, are receiving additional income from outside sources equivalent to the amount of the exemptions that are accorded to citizens of New York and denied to them.

In the brief submitted by the Attorney General of New York in behalf of appellant, it is said that the framers of the act, in embodying in it the provision for unequal treatment of the residents of other states with respect to the exemptions, looked forward to the speedy adoption of an income tax by the adjoining states, in which event injustice to their citizens on the part of New York could be avoided by providing similar exemptions similarly conditioned. This, however, is wholly speculative; New York has no authority to legislate for the adjoining states; and we must pass upon its statute with respect to its effect and operation in the existing situation. But besides, in view of the provisions of the Constitution of the United States, a discrimination by the state of New York against the citizens of adjoining states would not be cured were those states to establish like discriminations against citizens of the state of New York. A state may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go into other states. Nor can discrimination be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution.

Decree affirmed.

Mr. Justice McREYNOLDS concurs in the result.

#### NOTE

1. Other cases in which the Supreme Court has considered how far the interstate privileges and immunities clause limits a state in making classifications for tax purposes are *Travellers Ins. Co. v. Conn.*, 185 U.S. 364, 22 S.Ct. 673, 46 L.Ed. 949 (1902); *Maxwell v. Bugbee*, 250 U.S. 525, 40 S.Ct. 2, 63 L.Ed. 1124 (1919); *Shaffer v. Carter*, 252 U.S. 37, 40 S.Ct. 221, 64 L.Ed. 445 (1920).

## FAUNTLEROY v. LUM.

Supreme Court of United States, 1908. 210 U.S. 230, 28 S.Ct. 641,  
52 L.Ed. 1039.

[Error to the Supreme Court of Mississippi. The facts are stated in the opinion.]

Mr. Justice HOLMES. This is an action upon a Missouri judgment, brought in a court of Mississippi. The declaration set forth the record of the judgment. The defendant pleaded that the original cause of action arose in Mississippi out of a gambling transaction in cotton futures; that he declined to pay the loss; that the controversy was submitted to arbitration, the question as to the illegality of the transaction, however, not being included in the submission; that an award was rendered against the defendant; that thereafter, finding the defendant temporarily in Missouri, the plaintiff brought suit there upon the award; that the trial court refused to allow the defendant to show the nature of the transaction, and that, by the laws of Mississippi, the same was illegal and void, but directed a verdict if the jury should find that the submission and award were made, and remained unpaid; and that a verdict was rendered and the judgment in suit entered upon the same. \* \* \* The plea was demurred to on constitutional grounds. \* \* \* The Supreme Court of Mississippi held the plea good \* \* \* and judgment was entered for the defendant. Thereupon the case was brought here. \* \* \*

The laws of Mississippi make dealing in futures a misdemeanor, and provide that contracts of that sort, made without intent to deliver the commodity or to pay the price, "shall not be enforced by any court." Annotated Code of 1892, §§ 1120, 1121, 2117. \* \* \*

[After deciding that the Mississippi courts had jurisdiction to consider the case:] We proceed at once to the further question, whether the illegality of the original cause of action in Mississippi can be relied upon there as a ground for denying a recovery upon a judgment of another state.

The doctrine laid down by Chief Justice Marshall was "that the judgment of a state court should have the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." *Hampton v. McConnel*, 3 Wheat. 234, 4 L.Ed. 378. There is no doubt that this quotation was supposed to be an accurate statement of the law as late as *Christmas v. Russell*, 5 Wall. 290,

18 L.Ed. 475, where an attempt of Mississippi, by statute, to go behind judgments recovered in other states, was declared void, and it was held that such judgments could not be impeached even for fraud.

But the law is supposed to have been changed by the decision in *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 8 S.Ct. 1370, 32 L.Ed. 239. That was a suit brought in this court by the state of Wisconsin upon a Wisconsin judgment against a foreign corporation. The judgment was for a fine or penalty imposed by the Wisconsin statutes upon such corporations doing business in the state and failing to make certain returns, and the ground of decision was that the jurisdiction given to this court by article 3, § 2, U.S.C.A.Const. art. 3, § 2, as rightly interpreted by the judiciary act, now Rev.Stat. § 687, 28 U.S.C.A. § 341, was confined to "controversies of a civil nature," which the judgment in suit was not. The case was not within the words of art. 1, § 1, U.S.C.A.Const. art. 1, § 1, and, if it had been, still it would not have, and could not have, decided anything relevant to the question before us. It is true that language was used which has been treated as meaning that the original claim upon which a judgment is based may be looked into further than Chief Justice Marshall supposed. But evidently it meant only to justify the conclusion reached upon the specific point decided, for the proviso was inserted that a court "cannot go behind the judgment for the purpose of examining into the validity of the claim." 127 U.S. 293, 8 S.Ct. 1375. However, the whole passage was only a dictum and it is not worth while to spend much time upon it.

We assume that the statement of Chief Justice Marshall is correct. It is confirmed by the act of May 26, 1790, chap. 11, 1 Stat. at L. 122 (Rev.Stat. § 905, 28 U.S.C.A. § 687), providing that the said records and judicial proceedings "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." See further *Tilt v. Kelsey*, 207 U.S. 43, 57, 28 S.Ct. 1, 52 L.Ed. 95. Whether the award would or would not have been conclusive, and whether the ruling of the Missouri court upon that matter was right or wrong, there can be no question that the judgment was conclusive in Missouri on the validity of the cause of action. *Pitts v. Fugate*, 41 Mo. 405; *State ex rel. Hudson v. Trammel*, 106 Mo. 510, 17 S.W. 502; *Re Copenhaver*, 118 Mo. 377, 24 S.W. 161, 40 Am.St.Rep. 382. A judgment is conclusive as to all the media concludendi (*United States v. California & O. Land Co.*, 192 U.S. 355, 24 S.Ct. 266, 48 L.Ed. 476); and it needs no

authority to show that it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law. Of course, a want of jurisdiction over either the person or the subject-matter might be shown. *Andrews v. Andrews*, 188 U. S. 14, 23 S.Ct. 237, 47 L.Ed. 366; *Clarke v. Clarke*, 178 U.S. 186, 20 S.Ct. 873, 44 L.Ed. 1028. But, as the jurisdiction of the Missouri court is not open to dispute, the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law. See *Godard v. Gray*, L.R. 6 Q.B. 139; *MacDonald v. Grand Trunk R. Co.*, 71 N.H. 448, 52 A. 982, 59 L.R.A. 448, 93 Am.St.Rep. 550; *Peet v. Hatcher*, 112 Ala. 514, 21 So. 711, 57 Am.St.Rep. 45.

We feel no apprehensions that painful or humiliating consequences will follow upon our decision. No court would give judgment for a plaintiff unless it believed that the facts were a cause of action by the law determining their effect. Mistakes will be rare. In this case the Missouri court no doubt supposed that the award was binding by the law of Mississippi. If it was mistaken, it made a natural mistake. The validity of its judgment, even in Mississippi, is, as we believe, the result of the Constitution as it always has been understood, and is not a matter to arouse the susceptibilities of the states, all of which are equally concerned in the question and equally on both sides.

Judgment reversed.

[WHITE, J., gave a dissenting opinion, in which concurred HARLAN, MCKENNA, and DAY, JJ.]

## NOTE

1. While a state is not required to permit another to use its courts to enforce its tax laws, it must recognize a judgment for such taxes rendered by the courts of the taxing state, *Moore v. Mitchell*, 30 F.2d 600 (C.C.A.N.Y.1929); *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 56 S.Ct. 229, 80 L.Ed. 220 (1935); see *State ex rel. Oklahoma Tax Comm. v. Rodgers*, 238 Mo.App. 1115, 193 S.W.2d 919 (1946) in which Oklahoma was permitted as a matter of comity to sue in Missouri court to collect a tax due it. See *R. A. Leflar, Extrastate Enforcement of Penal and Governmental Claims*, 46 Harv. L.Rev. 193 (1932).

2. The duty to treat the judgment of the court of another state as *res judicata* and as a defense to an action in a state court exists wherever the two actions are in substance, even though not in form, identical, *Chicago, R. I. & Pac. Ry. Co. v. Schendel*, 270 U.S. 611, 46 S.Ct. 420, 70 L.Ed. 757 (1926).

3. See generally E. S. Corwin, The "Full Faith and Credit" Clause, 81 U.Pa.L.Rev. 371 (1933); J. W. Moore and R. S. Oglebay, The Supreme Court and Full Faith and Credit, 29 Va.L.Rev. 557 (1943); E. E. Cheatham, Res Judicata and the Full Faith and Credit Clause, 44 Col.L.Rev. 330 (1944); G. W. C. Ross, Full Faith and Credit in a Federal System, 20 Minn.L.Rev. 140 (1936); H. Schofield, Full Faith and Credit v. Comity, 10 Ill.L.Rev. 11 (1915); R. H. Jackson, Full Faith and Credit; The Lawyers' Clause of the Constitution, 45 Col.L.Rev. 1 (1945); M. Radin, The Authenticated Full Faith and Credit Clause, 39 Ill.L.Rev. 1 (1944); W. W. Cook, Powers of Congress Under the Full Faith and Credit Clause, 28 Yale L.Jour. 421 (1919).

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### ADAM v. SAENGER.

Supreme Court of the United States, 1938. 303 U.S. 59, 58 S.Ct. 454, 82 L.Ed. 649.

Mr. Justice STONE delivered the opinion of the Court.

The question for decision is whether the action, in this case, of the Texas state courts, in dismissing a suit founded upon a judgment of the Supreme Court of California, denied to the judgment the faith and credit which the Constitution, article 4, § 1, U.S.C.A.Const. art. 4, § 1, commands.

Petitioner, as assignee of a California judgment against the Beaumont Export & Import Company, a Texas corporation, brought the present suit in the Texas state district court against respondents, directors of the corporation acting as its trustees in dissolution, and against its stockholders as transferees of corporate assets, to collect the judgment. His petition sets out in detail the circumstances attending the rendition of the California judgment and incorporates by reference a duly attested copy of the judgment roll.

It appears that the corporation brought suit in the superior court of California, a court of general jurisdiction, against Montes, petitioner's predecessor in interest, to recover a money judgment for goods sold and delivered. Thereupon Montes, following what is alleged to be the California practice, with leave of the court brought a cross-action against the corporation, by service of a cross-complaint upon the corporation's attorney of record in the pending suit, to recover for the conversion of chattels. Judgment in the cross-action, taken by default, was followed by dismissal of the corporation's suit and is the judgment which is the subject of the present suit. A motion to open the default and to be allowed to defend, made later on behalf of the corporation, was contested and was denied by the court, the issue being whether the complaint was in fact served on the plaintiff's attorney.

The trial court sustained a general demurrer to the complaint and gave judgment dismissing the cause, which the Texas Court of Civil Appeals affirmed, 101 S.W.2d 1046. Petition to the Texas Supreme Court for a writ of error was denied for want of jurisdiction. We granted certiorari, 302 U.S. 668, 58 S.Ct. 28, 82 L.Ed. 515; cf. *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 51 S.Ct. 228, 75 L.Ed. 482, the question being an important one of constitutional law. Our writ is properly directed to the Texas Court of Civil Appeals, it being the highest court of the state in which a judgment could be had. *Bacon v. Texas*, 163 U.S. 207, 215, 16 S.Ct. 1023, 41 L.Ed. 132; *Sullivan v. Texas*, 207 U.S. 416, 28 S.Ct. 215, 52 L.Ed. 274; *San Antonio Railway Co. v. Wagner*, 241 U.S. 476, 36 S.Ct. 626, 60 L.Ed. 1110; *American Railway Express Co. v. Levee*, 263 U.S. 19, 44 S.Ct. 11, 68 L.Ed. 140.

The Texas Court of Civil Appeals rested its decision on a single ground, want of jurisdiction of the California court over the corporation in the cross-action in which the judgment was rendered. Construing the California statutes and decisions which the complaint set out, it concluded that they did not authorize service of the complaint in the cross-action upon the plaintiff's attorney of record. It held further that in any case as the corporation was not present within the state no jurisdiction could be acquired over it by the substituted service, and the California judgment was consequently without due process and a nullity beyond the protection of the full faith and credit clause. To review these rulings we brought the case here. Cf. *Ward v. Love County*, 253 U.S. 17, 25, 40 S.Ct. 419, 422, 64 L.Ed. 751; *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685, 113 A.L.R. 1482, decided this day.

By R.S. § 905, 28 U.S.C. § 687, 28 U.S.C.A. § 687, enacted under authority of the full faith and credit clause, article 4, section 1, of the Constitution, the duly attested record of the judgment of a state is entitled to such faith and credit in every court within the United States as it has by law or usage in the state from which it is taken. If it appears on its face to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself. *Hanley v. Donoghue*, 116 U.S. 1, 6 S.Ct. 242, 29 L.Ed. 535; *Knowles v. Logansport Gaslight & Coke Co.*, 19 Wall. 58, 22 L.Ed. 70; *Settlemier v. Sullivan*, 97 U.S. 444, 24 L.Ed. 1110. But in a suit upon the judgment of another state the jurisdiction of the court which rendered it is open to judicial inquiry, *Chicago Life Insurance Co. v. Cherry*, 244 U.S. 25, 37 S.Ct. 492, 61 L.Ed. 966, and when the matter of fact or law on which jurisdiction depends was not litigated in the original

suit it is a matter to be adjudicated in the suit founded upon the judgment. *Thompson v. Whitman*, 18 Wall. 457, 21 L.Ed. 897. Here the fact of the service of the complaint upon the attorney is alleged by the petitioner and admitted by the demurrer, but the court's conclusion that the California court was without jurisdiction, resting in part upon its construction of the California statutes, presents an issue not litigated in the California suit which must be determined in the present one.

Congress has not prescribed the manner in which the legal effect of the judgment and the proceedings on which it is founded in the state where rendered are to be ascertained by the courts of another state. It has left that to the applicable procedure of the courts in which they are drawn in question. Where they are in issue this Court, in the exercise of its appellate jurisdiction to review cases coming to it from state courts, takes judicial notice of the law of the several states to the same extent that such notice is taken by the court from which the appeal is taken. "Whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here." *Hanley v. Donoghue*, supra, 116 U.S. 1, at page 6, 6 S.Ct. 242, 245, 29 L.Ed. 535.

According to Texas law the legal effect of the judgment of another state, on which suit is brought is to be determined by the court, not the jury. But a suitor who asserts that the force and effect of the judgment is different from that of a similar judgment of the courts of the state is required to allege specifically and prove as matter of fact the particular laws or usage on which he relies to establish the difference, and on demurrer only the law or usage specifically alleged will be considered in determining whether the law of another state differs from that of Texas. *Porcheler v. Bronson*, 50 Tex. 555; *Gill v. Everman*, 94 Tex. 209, 59 S.W. 531; *National Bank of Commerce v. Kenney*, 98 Tex. 293, 83 S.W. 368.

In the present suit petitioner, in conformity to the state procedure, has set out in his complaint the California statutes and the citations of the decisions of California courts which he contends establish the law of that state that a cross-action in a pending suit may be begun by service of a cross-complaint upon the plaintiff's attorney. The question thus raised upon demurrer for decision by the court is the legal effect in California of the service, and hence of the judgment founded upon it. Whether the question be regarded as one of fact or more precisely and accurately as a question of law to be determined as are other questions of law, although procedural exigencies require it to be presented by the pleading and proof, as are issues of fact, it is one

arising under the Constitution and a statute of the United States which commands that such faith and credit shall be given by every court to the California proceedings "as they have by law or usage" of that state. And since the existence of the federal right turns on the meaning and effect of the California statute, the decision of the Texas court on that point, whether of law or of fact, is reviewable here.

While this Court re-examines such an issue with deference after its determination by a state court, it cannot, if the laws and Constitution of the United States are to be observed, accept as final the decision of the state tribunal as to matters alleged to give rise to the asserted federal right. This is especially the case where the decision is rested, not on local law or matters of fact of the usual type, which are peculiarly within the cognizance of the local courts, but upon the law of another state, as readily determined here as in a state court. *Huntington v. Attrill*, 146 U.S. 657, 684, 13 S.Ct. 224, 36 L.Ed. 1123; *Yarborough v. Yarborough*, 168 S.C. 46, 166 S.E. 877; *Id.*, 290 U.S. 202, 54 S.Ct. 181, 78 L.Ed. 269, 90 A.L.R. 924.

In ruling that the service in the California suit was unauthorized, the Texas Court of Civil Appeals said: "The cross-action was not an ancillary proceeding, but an independent suit in which a final judgment could be rendered without awaiting a decision in the original suit. *Farrar v. Steenbergh*, 173 Cal. 94, 159 P. 707. It is well settled in this state that a cross-action occupies the attitude of an independent suit and requires service of the cross-action upon the cross-defendant. *Harris v. Schlinke*, 95 Tex. 88, 65 S.W. 172. This being so, in the absence of a waiver of service, or an appearance by the cross-defendant, personal service on the cross-defendant must be had to confer jurisdiction upon the court to determine the matter and render judgment in the case."

But the question presented by the pleadings is the status of a cross-action under the California statutes, not under those of Texas. We think its status is adequately disclosed by the California statutes and decisions pleaded by petitioner, and is that for which he contends. \* \* \*

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

Mr. Justice BLACK concurs in the result.

## NOTE

1. The importance of jurisdiction of the court rendering a judgment or decree to its recognition in other states is dramatically illustrated in the long series of cases involving divorce decrees. The leading cases dealing with it are the two Williams Cases, *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942); *Sherrer v. Sherrer*, — U.S. —, 68 S.Ct. 1087, 92 L.Ed. — (1948); *Coe v. Coe*, — U.S. —, 68 S.Ct. 1094, 92 L.Ed. — (1948); *Williams v. North Carolina*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945). See also *Eisenwein v. Pennsylvania*, 325 U.S. 279, 65 S.Ct. 1118, 89 L.Ed. 1608 (1945). See J. H. Beale, *Constitutional Protection of Decrees for Divorce*, 19 *Harv.L.Rev.* 586 (1906); J. H. Beale, *Haddock Revisited*, 39 *Harv.L.Rev.* 417 (1926); J. W. Bingham, *Song of Six Pence. Some Comments on Williams v. North Carolina*, 29 *Cornell L.Quar.* 1 (1943); T. R. Powell, *And Repent at Leisure*, 58 *Harv.L.Rev.* 930 (1945); Gerhart Husserl, *Some Reflections on Williams v. North Carolina II*, 32 *Va.L.Rev.* 555, 980 (1946).

2. For discussion of full faith and credit bearing on alimony decrees and custody awards, see *Barber v. Barber*, 323 U.S. 77, 65 S.Ct. 137, 89 L.Ed. 82 (1944); *Griffin v. Griffin*, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 635 (1946); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947); *Estin v. Estin*, — U.S. —, 68 S.Ct. 1213, 92 L.Ed. — (1948).

3. See also P. E. Farrier, *Full Faith and Credit of Adjudications of Jurisdictional Facts*, 2 *U.Chicago L.Rev.* 552 (1935); Note, *Due Process and the Full Faith and Credit Clause*, 34 *Yale L.Jour.* 886 (1925); Note, *Full Faith and Credit. Collateral Attack on Sister State Judgment Obtained by Fraud*, 11 *Minn.L.Rev.* 150 (1927); H. R. Medina, *Conclusiveness of Rulings on Jurisdiction*, 31 *Col.L.Rev.* 238 (1931).

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MAGNOLIA PETROLEUM COMPANY v. HUNT.

Supreme Court of the United States, 1943.  
320 U.S. 430, 64 S.Ct. 208, 88 L.Ed. 149.

Mr. Chief Justice STONE delivered the opinion of the Court.

The question for decision is whether, under the full faith and credit clause, Art. IV, § 1 of the Constitution of the United States, an award of compensation for personal injury under the Texas Workmen's Compensation Law, Title 130 of the Revised Civil Statutes of Texas, Vernon's Ann.Civ.St. art. 8306 et seq., bars a further recovery of compensation for the same injury under the Louisiana Workmen's Compensation Law, Title 34, Chapter 15 of the Louisiana General Statutes, Act No. 20 of 1914, as amended.

Magnolia Petroleum Company, petitioner here, employed respondent in Louisiana as a laborer in connection with the drilling of oil wells. In the course of his employment respondent, a Louisiana resident, went from Louisiana to Texas, and while working there for petitioner on an oil well, he was injured by a falling drill stem. He sought and procured in Texas an award of compensation for his injury under its Workmen's Compensation Law, and petitioner's insurer made payments of compensation as required by the statute and the award. The award became final in accordance with the terms of the Texas statute.

Respondent then brought the present proceeding in the Louisiana District Court to recover compensation for his injury under the Louisiana Workmen's Compensation Law. Petitioner filed exceptions to respondent's petition on the ground that the recovery sought was barred as *res judicata* by the Texas award which, by virtue of the constitutional command, was entitled in the Louisiana courts to full faith and credit. The District Court overruled the exceptions and gave judgment for the amount of the compensation fixed by the Louisiana statute, after deducting the amount of the Texas payments. The Louisiana Court of Appeal affirmed, 10 So.2d 109, and the Supreme Court of Louisiana refused writs of certiorari and review for the reason that it found "no error of law in the judgment complained of." We granted certiorari, 319 U.S. 734, 63 S.Ct. 1031, because of the importance of the constitutional question presented and to resolve an apparent conflict of the decision below with our decisions in *Chicago, R. I. & P. R. Co. v. Schendel*, 270 U.S. 611, 46 S.Ct. 420, 70 L.Ed. 757, 53 A.L.R. 1265, and *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 143 A.L.R. 1273; cf. *Alaska Packers Ass'n v. Industrial Accident Commission*, 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044; *Pacific Employers Ins. Co. v. Industrial Accident Commission*, 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940.

In Texas a compensation award against the employer's insurer (with exceptions not here applicable, cf. Revised Civil Statutes, Art. 8306, § 5) is explicitly made by statute in lieu of any other recovery for injury to the employee, since Art. 8306, § 3 provides that employees subject to the Act "shall have no right of action against their employer or against any agent, servant or employé of said employer for damages for personal injuries \* \* \* but such employés \* \* \* shall look for compensation solely to the association [the insurer]". A compensation award which has become final "is entitled to the same faith and credit as a judgment of a court." See *Ocean Accident & Guarantee Corp.*

v. Pruitt, Tex.Com.App., 58 S.W.2d 41, 44, 45, holding that an award is *res judicata*, not only as to all matters litigated, but as to all matters which could have been litigated in the proceeding with respect to the right to compensation for the injury.

\* \* \* The Texas Court of Civil Appeals formerly held that a Texas employee could recover compensation of his Texas employer for an injury in another state for which he had already recovered compensation in that state. *Texas Employers' Ins. Ass'n v. Price*, Tex.Civ.App., 300 S.W. 667. But in declining to review the case, the Texas Supreme Court expressly pointed out that this ruling had not been challenged, and that it was leaving the question undecided, 300 S.W. 672. The right of a second recovery in such circumstances was promptly abolished by statute. Revised Civil Statutes, Art. 8306, § 19. And under this statute a compensation award may not be had in Texas if the employee has claimed and received compensation for his injury under the laws of another state. \* \* \*

The Louisiana Court of Appeal recognized that Texas had jurisdiction to award compensation to respondent for the injury received while working for petitioner within the state, and that the award has the same force and effect in Texas as a judgment rendered by a court of competent jurisdiction in that state. But it thought that full faith and credit did not require the Louisiana courts to give effect to the judgment as *res judicata* because Louisiana, despite the command of the full faith and credit clause, was entitled to give effect to its own statute prescribing compensation for resident employees of a resident employer even though the injury occurred outside the state.

It does not appear, nor is it contended that Louisiana more than Texas allows in its own courts a second recovery of compensation for a single injury. The contention is that since Louisiana is better satisfied with the measure of recovery allowed by its own laws, it may deny full faith and credit to the Texas award, which respondent has procured by his election to pursue his remedy in that state. In thus refusing, on the basis of state law and policy, to give effect to the Texas award as a final adjudication of respondent's claim for compensation for his injury suffered in Texas, the Louisiana court ignored the distinction, long recognized and applied by this Court, and recently emphasized in *Williams v. North Carolina*, supra, 317 U.S. at pages 294-296, 63 S.Ct. at page 211, 212, 143 A.L.R. 1273, between the faith and credit required to be given to judgments and that to which local common and statutory law is entitled under the Constitution and laws of the United States.

In the case of local law, since each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders, the full faith and credit clause does not ordinarily require it to substitute for its own law the conflicting law of another state, even though that law is of controlling force in the courts of that state with respect to the same persons and events. *Pink v. A. A. Highway Exp., Inc.*, 314 U.S. 201, 209-211, 62 S.Ct. 241, 246, 247, 86 L.Ed. 152, 137 A.L.R. 957, and cases cited; *Klaxon Co. v. Stentor Electric Co.*, 313 U.S. 487, 496-498, 61 S.Ct. 1020, 1021, 1022, 86 L.Ed. 1477. It was for this reason that we held that the state of the employer and employee is free to apply its own compensation law to the injury of the employee rather than the law of another state where the injury occurred. *Alaska Packers Ass'n v. Industrial Accident Commission*, *supra*, 294 U.S. at pages 544-550, 55 S.Ct. at pages 522-525, 79 L.Ed. 1044. And for like reasons we held also that the state of the place of injury is free to apply its own law to the exclusion of the law of the state of the employer and employee. *Pacific Employers Ins. Co. v. Industrial Accident Commission*, *supra*, 306 U.S. at pages 502-505, 59 S.Ct. at pages 633, 634, 83 L.Ed. 940.

But it does not follow that the employee who has sought and recovered an award of compensation in either state may then have recourse to the laws and courts of the other to recover a second or additional award for the same injury. Where a court must make choice of one of two conflicting statutes of different states and apply it to a cause of action which has not been previously litigated, there can be no plea of *res judicata*. But when the employee who has recovered compensation for his injury in one state seeks a second recovery in another he may be met by the plea that full faith and credit requires that his demand, which has become *res judicata* in one state, must be recognized as such in every other.

The full faith and credit clause and the Act of Congress implementing it have, for most purposes, placed a judgment on a different footing from a statute of one state, judicial recognition of which is sought in another. Article IV, § 1, of the Constitution commands that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State", and provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof". And Congress has provided that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which

they are taken." Act of May 26, 1790, c. 11, 1 Stat. 122, as amended, 28 U.S.C. § 687, 28 U.S.C.A. § 687.

From the beginning this Court has held that these provisions have made that which has been adjudicated in one state *res judicata* to the same extent in every other. \* \* \* Even though we assume for present purposes that the command of the Constitution and the statute is not all-embracing, and that there may be exceptional cases in which the judgment of one state may not override the laws and policy of another, this Court is the final arbiter of the extent of the exceptions. \* \* \* And we pointed out in *Williams v. North Carolina*, supra, 318 U.S. at pages 294, 295, 63 S.Ct. at page 211, 212, 143 A.L.R. 1273, that "the actual exceptions have been few and far between \* \* \*."

We are aware of no such exception in the case of a money judgment rendered in a civil suit. Nor are we aware of any considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to such a judgment outside the state of its rendition. \* \* \*

The constitutional command requires a state to enforce a judgment of a sister state for its taxes, *Milwaukee County v. M. E. White Co.*, or for a gambling debt, *Fauntleroy v. Lum*, or for damages for wrongful death, *Kenney v. Supreme Lodge*, although the suit in which the judgment was obtained could not have been maintained under the laws and policy of the forum to which the judgment is brought. It compels enforcement of a judgment in that forum, even though a suit upon the original cause of action was barred there by limitations before the judgment was procured. *Christmas v. Russell*, supra; *Roche v. McDonald*, 275 U.S. 449, 48 S.Ct. 142, 72 L.Ed. 365, 53 A.L.R. 1141. It demands recognition of it even though the statute on which the judgment was founded need not be applied in the state of the forum because in conflict with the laws and policy of that state. \* \* \*

These consequences flow from the clear purpose of the full faith and credit clause to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other. The full faith and credit clause like the commerce clause thus became a nationally unifying force. It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and

obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application. \* \* \* Because there is a full faith and credit clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment and a plaintiff may not for his single cause of action secure a second or a greater recovery.

Here both Texas and Louisiana have undertaken to adjudicate the rights of the same parties arising from a single injury sustained in the courts of employment under the same contract. Each state has awarded to respondent compensation for that injury. But whether the Texas award purported also to adjudicate the rights and duties of the parties under the Louisiana law or to control persons and courts in Louisiana is irrelevant to our present inquiry. For Texas is without power to give extraterritorial effect to its laws. See *New York Life Ins. Co. v. Head*, 234 U.S. 149, 34 S.Ct. 879, 58 L.Ed. 1259; *Home Insurance Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926, 74 A.L.R. 701. The significant question in this case is whether the full faith and credit clause has deprived Louisiana of the power to deny that the Texas award has the same binding effect on the parties in Louisiana as it has in Texas.

It is not, as the state court thought, a sufficient answer to the bar of the Texas award to assert that Louisiana has a recognized interest in awarding compensation to Louisiana employees who are injured out of the state, see *Alaska Packers Ass'n v. Industrial Accident Commission*, *supra*, for Texas, the state in which the injury occurred, has a like interest in making an award, see *Pacific Employers Insurance Co. v. Industrial Accident Commission*, *supra*. And in each of the cases we have cited, the state to which the judgment was brought had an interest in the subject matter of the suit and a public policy contrary to that of the state in which the judgment was obtained. No convincing reason is advanced for saying that Louisiana has a greater interest in awarding compensation for an injury suffered in an industrial accident, than North Carolina had in determining the marital status of its domiciliary against whom a divorce decree had been rendered in another state, *Williams v. North Carolina*, *supra*, or Mississippi in stamping out gambling within its borders, *Fauntleroy v. Lum*, *supra*, or South Carolina in requiring a parent to support his child who was domiciled within that state, *Yarborough v. Yarborough*, 290 U.S. 202, 54 S.Ct. 181, 78 L.Ed. 269, 90 A.L.R. 924.

In each of these cases the words and purpose of the full faith and credit clause were thought to demand that the interest of the state in which the judgment was obtained and was *res judicata*, should override the laws and policy of the forum to which the judgment was taken. And we can perceive no tenable ground for saying that a compensation award need not be given the same effect as *res judicata* in another state as it has in the state where rendered. Such was the decision of this Court in *Chicago, R. I. & P. R. Co. v. Schendel*, *supra*, in which recovery of an award of compensation under the Iowa Workmen's Compensation Act was held to bar recovery in a suit against the employer in Minnesota to recover for the same injury under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. Both sides had, as in this case, allowed recovery, as they were free to do but for the full faith and credit clause. This Court held that the employee, having had his remedy by the judgment in Iowa, was precluded by the full faith and credit clause from pursuing a remedy for his injury in another state. The remedies afforded to respondent by the Texas and Louisiana Workmen's Compensation Laws are likewise rendered mutually exclusive by the Texas judgment and the full faith and credit clause. The Texas award, being a bar to any further recovery of compensation for respondent's injury, is, by virtue of the full faith and credit clause, exclusive of his remedy under the Louisiana Act.

It lends no support to the decision of the Louisiana court in this case to say that Louisiana has chosen to be more generous with an employee than Texas has. Indeed no constitutional question would be presented if Louisiana chose to be generous to the employee out of the general funds in its Treasury. But here it is petitioner who is required to provide further payments to respondent, contrary to the terms of the Texas award, which, if the full faith and credit clause is to be given any effect, was a conclusive determination between the parties that petitioner should be liable for no more than the amount of the Texas award. For this reason it is not enough to say that a practical reconciliation of the interests of Texas and Louisiana has been effected by the Louisiana court. There has been no reconciliation of the liability established by the Louisiana judgment with the rights conferred on petitioner by the Texas award and the full faith and credit clause.

Here the finding of the Louisiana court that the Texas award had the force and effect of a judgment of a court of that state and is *res judicata* there, is in conformity to the determinations of the courts of Texas and has not been challenged by the parties.

We have no occasion to consider what effect would be required to be given to the Texas award if the Texas courts held that an award of compensation in another state would not bar an award in Texas, for as we have seen, Texas does not allow such a second recovery. And if the award of compensation in Texas were not *res judicata* there, full faith and credit would, of course, be no bar to the recovery of an award in another state. \* \* \* Whether the proceeding before the State Industrial Accident Board in Texas be regarded as a "judicial proceeding", or its award is a "record" within the meaning of the full faith and credit clause and the Act of Congress, the result is the same. For judicial proceedings and records of the state are both required to have "such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

The decision of the state court is not supported by the suggestion that the Texas award is not *res judicata* in Louisiana because respondent's suit there was on a different cause of action. When a state court refuses credit to the judgment of a sister state because of its opinion of the nature of the cause of action or the judgment in which it is merged, an asserted federal right is denied and the sufficiency of the grounds of denial are for this Court to decide. \* \* \* Respondent's injury in Texas did not give rise to two causes of action merely because recovery in each state is under a different statute, or because each affords a different measure of recovery. \* \* \* The grounds of recovery are the same in one state as in the other—the injury to the employee in the course of his employment. The whole tendency of our decisions under the full faith and credit clause is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot split up his claim and "a fortiori, he cannot divide the grounds of recovery." *United States v. California & O. Land Co.*, 192 U.S. 355, 358, 24 S.Ct. 266, 267, 48 L.Ed. 476. Respondent was free to pursue his remedy in either state but, having chosen to seek it in Texas, where the award was *res judicata*, the full faith and credit clause precludes him from again seeking a remedy in Louisiana upon the same grounds. The fact that a suitor has been denied a remedy by one state because it does not afford a remedy for the particular wrong alleged, may not bar recovery in another state which does provide a remedy. See *Troxell v. Delaware, L. & W. R. Co.*, 227 U.S. 434, 33 S.Ct. 274, 57 L.Ed. 586; cf. *Ash Sheep Co. v. United States*, 252 U.S. 159, 170, 40 S.Ct. 241, 244, 64 L.Ed. 507. But as we decided in the *Schendel* case it is a very different matter to say that recovery can be had in every state which affords a remedy.

The suggestion that there is a second and different cause of action in Louisiana, merely because Louisiana law authorizes compensation, and in a different measure than does Texas, or because the jurisdiction of the court of one state depends on the place of the injury and that of the other on the place of the employment contract, would if accepted prove too much. Apart from the demands of full faith and credit, recovery in a transitory action for injury to person or property, whether in tort or for compensation, can of course only be had in conformity to the law of the state where the action is maintained. Even where the state of the forum adopts and applies as its own the law of the state where the injury was inflicted, the extent to which it shall apply in its own courts a rule of law of another state is itself a question of local law of the forum. \* \* \* And the law of a state is embodied as well in its common law rules as in its statutes. \* \* \*

If an employee employed in one state but injured in another has a different cause of action for compensation in each state because each has its own compensation statute, it could as well be argued in any case where plaintiff has recovered a judgment in one state, and seeks a second recovery in a second state for the same injury, that he is suing upon a second and different cause of action. But it has never been thought that an actionable personal injury gives rise to as many causes of action as there are states whose laws will permit a suit to recover for the injury or that despite the full faith and credit clause the injured person, more than one entitled to recover for breach of contract, could go from state to state to recover in each damages or compensation for his injury. A judgment in tort or in contract is not immune from the requirement of full faith and credit because the successful plaintiff could have maintained his suit under the law of other states and have secured a larger recovery in some, or because the jurisdiction of the court in one state to hear the cause may depend upon some facts different from the facts necessary to sustain the jurisdiction in another. \* \* \* And we cannot say that a workmen's compensation award for injury stands on any different footing. In fact *Chicago, R. I. & P. R. Co. v. Schendel*, supra, held that it did not and we see no reason to depart from its ruling.

Reversed.

Mr. Justice JACKSON concurred in a separate opinion. Mr. Justice DOUGLAS dissented, with Justices RUTLEDGE and MURPHY concurring in his opinion.

## NOTE

1. The Supreme Court has in several cases passed on the question whether the Workmen's Compensation Act of the state of the injury or that of the state in which the employment contract was entered into shall govern the injured employee's rights. The decisions reflect the Court's appraisal of the relative values of the interests of the states involved, *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026 (1932); *Ohio v. Chattanooga Boiler & Tank Co.*, 289 U.S. 439, 53 S.Ct. 663, 77 L.Ed. 1307 (1933); *Alaska Packers' Ass'n v. Ind. Comm. of California*, 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044 (1935); *Pacific Employers Ins. Co. v. Ind. Accident Comm. of California*, 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940 (1939). As to when the judgment in one state bars recovery in the other, see in addition to the reported case, *Industrial Comm. of Wisconsin v. McCartin*, 330 U.S. 622, 67 S.Ct. 886, 91 L. Ed. 1140 (1947). See *Rose, Foreign Enforcement of Actions for Wrongful Death*, 33 Mich.L.Rev. 545 (1935).

2. The full faith and credit clause (Const.U.S. art. 4, § 1) requires a state to recognize rights conferred, and obligations imposed, by the statutes of another state so far as their creation is within the latter's power, *Broderick v. Rosner*, 294 U.S. 629, 55 S.Ct. 589, 79 L.Ed. 1100 (1935). It is on this basis that the powers of a corporation or a fraternal benefit society, their relations to their members, and the relations of the members *inter sese*, as defined by the state of incorporation or organization must be recognized by other states, *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 35 S.Ct. 692, 59 L.Ed. 1165 (1915); *Royal Arcanum v. Green*, 237 U.S. 531, 35 S. Ct. 724, 59 L.Ed. 1089 (1915); *Sovereign Camp, W. O. W. v. Bolin*, 305 U.S. 66, 59 S.Ct. 35, 83 L.Ed. 45 (1938); for an extreme application of this theory, see *Order of United Commercial Travellers v. Wolfe*, 331 U.S. 586, 67 S.Ct. 1355, 91 L.Ed. 1687 (1947), the majority and dissenting opinions in which review a wide range of previous decisions. This does not, however, prevent such other state from determining whether its residents have assented to membership obligations sought to be imposed upon them by extrastate law, *Pink v. A. A. Highway Express, Inc.*, 314 U.S. 201, 62 S.Ct. 241, 86 L. Ed. 152 (1941). See S. I. Langmaid, *The Full Faith and Credit Required for Public Acts*, 24 Ill.L.Rev. 383 (1929); *Note, Full Faith and Credit to Statutes*, 45 Yale L.Jour. 339 (1935); *O. P. Field, Judicial Notice of Public Acts Under the Full Faith and Credit Clause*, 12 Minn.L.Rev. 439 (1928).

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## KANSAS v. COLORADO.

Supreme Court of United States, 1902. 185 U.S. 125, 22 S.Ct. 552,  
46 L.Ed. 838.

[Original bill of complaint by Kansas against Colorado, alleging in substance a large diversion of the waters of the Arkansas river as it flowed through Colorado, made by or under the authority of that state for purposes of irrigation, which so diminished the flow of the river below in Kansas as greatly to injure the owners of riparian land, of which Kansas itself owned two small parcels used by it for a soldiers' home and a reformatory. An injunction was prayed against any further diversion of said river in Colorado by that state, and against the granting of any further authority by Colorado to private persons to divert said water, except for domestic use. Demurrer, upon the ground, among others, that the matters alleged showed no controversy between states within the meaning of the Constitution.]

Mr. Chief Justice FULLER. \* \* \* By the 1st clause of § 10 of article 1 of the Constitution U.S.C.A.Const. art. 1, § 10, cl. 1, it was provided that "no state shall enter into any treaty, alliance, or confederation;" and by the 3d clause that "no state shall, without the consent of the Congress, \* \* \* keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." \* \* \*

Undoubtedly, as remarked by Mr. Justice Bradley in *Hans v. Louisiana*, 134 U.S. 1, 15, 10 S.Ct. 504, 507, 33 L.Ed. 842, 847, the Constitution made some things justiciable "which were not known as such at the common law—such, for example, as controversies between states as to boundary lines and other questions admitting of judicial solution." And as the remedies resorted to by independent states for the determination of controversies raised by collision between them were withdrawn from the states by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, was made justiciable by that instrument.

In *Missouri v. Illinois*, 180 U.S. 208, 21 S.Ct. 331, 45 L.Ed. 497, it was alleged that an artificial channel or drain constructed by the sanitary district for purposes of sewerage, under authority derived from the state of Illinois, created a continuing nuisance dangerous to the health of the people of the state of Missouri; and the bill charged that the acts of defendants, if not restrained, would result in poisoning the water supply of the inhabitants of Missouri, and in injuriously affecting that portion of the bed of the Mississippi river lying within its territory. In dis-

posing of a demurrer to the bill, numerous cases involving the exercise of original jurisdiction by this court were examined; and the court, speaking through Mr. Justice Shiras, said:

"The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a state. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court. An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state, but it must surely be conceded that if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. If Missouri were an independent and sovereign state, all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering. The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the state situated on the Mississippi river are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the state. Moreover, substantial impairment of the health and prosperity of the towns and cities of the state situated on the Mississippi river, including its commercial metropolis, would injuriously affect the entire state. That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."

As will be perceived, the court there ruled that the mere fact that a state had no pecuniary interest in the controversy would not defeat the original jurisdiction of this court, which might be invoked by the state as *parens patriæ*, trustee, guardian, or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between states, under the authority of one of them, thereby

putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution.

In the case before us the state of Kansas files her bill as representing and on behalf of her citizens, as well as in vindication of her alleged rights as an individual owner, and seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the state, and the consequent destruction of the property of herself and of her citizens and injury to their health and comfort. The action complained of is state action, and not the action of state officers in abuse or excess of their powers.

The state of Colorado contends that, as a sovereign and independent state, she is justified, if her geographical situation and material welfare demand it in her judgment, in consuming for beneficial purposes all the waters within her boundaries; and that, as the sources of the Arkansas river are in Colorado, she may absolutely and wholly deprive Kansas and her citizens of any use of or share in the waters of that river. She says that she occupies toward the state of Kansas the same position that foreign states occupy toward each other, although she admits that the Constitution does not contemplate that controversies between members of the United States may be settled by reprisal or force of arms, and that to secure the orderly adjustment of such differences power was lodged in this court to hear and determine them. The rule of decision, however, it is contended, is the rule which controls foreign and independent states in their relations to each other; that by the law of nations the primary and absolute right of a state is self-preservation; that the improvement of her revenues, arts, agriculture, and commerce are incontrovertible rights of sovereignty; that she has dominion over all things within her territory, including all bodies of water, standing or running, within her boundary lines; that the moral obligations of a state to observe the demands of comity cannot be made the subject of controversy between states; and that only those controversies are justiciable in this court which, prior to the Union, would have been just cause for reprisal by the complaining state; and that, according to international law, reprisal can only be made when a positive wrong has been inflicted or rights stricti juris withheld.

But when one of our states complains of the infliction of such wrong or the deprivation of such rights by another state, how shall the existence of cause of complaint be ascertained, and be accommodated if well founded? The states of this Union cannot make war upon each other. They cannot "grant letters of

marque and reprisal." They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations, and make treaties. \* \* \*

The publicists suggest as just causes of war: defense; recovery of one's own; and punishment of an enemy. But, as between states of this Union, who can determine what would be a just cause of war? Comity demanded that navigable rivers should be free, and therefore the freedom of the Mississippi, the Rhine, the Scheldt, the Danube, the St. Lawrence, the Amazon, and other rivers has been at different times secured by treaty; but if a state of this Union deprives another state of its rights in a navigable stream, and Congress has not regulated the subject, as no treaty can be made between them, how is the matter to be adjusted? \* \* \*

Without subjecting the bill to minute criticism, we think its averments sufficient to present the question as to the power of one state of the Union to wholly deprive another of the benefit of water from a river rising in the former, and by nature, flowing into and through the latter; and that therefore this court, speaking broadly, has jurisdiction. \* \* \* Sitting, as it were, as an international, as well as a domestic, tribunal, we apply federal law, state law, and international law, as the exigencies of the particular case may demand; and we are unwilling in this case to proceed on the mere technical admissions made by the demurrer. \* \* \* The result is that in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence.

Demurrer overruled, with leave to answer.

[GRAY, J., took no part in the decision.]

#### NOTE

1. The United States Constitution also contains the following other provisions dealing with the relations between the states: (1) The interstate rendition clause, Art. 4, § 2; and (2) the interstate compact clause, Art. 1, § 10. As to the former, see *Kentucky v. Dennison*, 24 How. 66, 16 L.Ed. 717 (1861). As to the latter, see *Virginia v. Tennessee*, 148 U.S. 503, 13 S.Ct. 728, 37 L.Ed. 537 (1893); *F. Frankfurter and J. M. Landis*, 34 *Yale L.Jour.* 685 (1925); *W. J. Donovan*, *State Compacts as a Method of Settling Problems Common to Several States*, 80 *U.Pa.L.Rev.* 5 (1931); Note, *Some Legal and Practical Problems of Interstate Compacts*, 45 *Yale L.Jour.* 324 (1936).

## CHAPTER 6

### THE POWERS OF CONGRESS. GENERAL CONSIDERATIONS

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#### LONG v. ANSELL.

Supreme Court of the United States, 1934. 293 U.S. 76, 55 S.Ct. 21,  
79 L.Ed. 208.

Mr. Justice BRANDEIS delivered the opinion of the Court.

On March 27, 1933, Samuel T. Ansell, a resident of the District of Columbia, brought in the Supreme Court of the District, an action for libel against Huey P. Long of Louisiana. The summons was served on the defendant within the District. It directed him to answer and show cause why the plaintiff should not have judgment for the cause of action stated in his declaration. The defendant, appearing specially, and solely for the purpose, filed on April 25, 1933, a motion to quash the summons and the service thereof on the following ground:

"The summons was issued on Monday, March 27, 1933 and served on the defendant on Monday, April 3, 1933, whereas the first session of the Seventy-third Congress was convened on the ninth day of March, 1933 and has remained continuously in session since that date, and was in session on the dates of the issuance and service of said summons (of which fact defendant prays the court to take judicial notice) and the defendant as alleged is a United States Senator who was in attendance upon the meetings of the first session of the Seventy-third Congress of the United States and the summons and service thereof is invalid and of no legal effect whatever because in violation of Article 1, Section 6, Clause 1, of the Constitution of the United States, U.S.C.A.Const. art. 1, § 6, cl. 1, which provides that Senators and Representatives of the United States 'shall in all cases except treason, felony and breach of the peace be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same.' "

On May 9, 1933, the Supreme Court of the District denied the motion, but stayed further proceedings for twenty days pending application to the Court of Appeals of the District for a special appeal. That court allowed the appeal. On February 5, 1934, it

affirmed the order denying the motion to quash. 63 App.D.C. 68, 69 F.2d 386. This Court granted certiorari. 292 U.S. 619, 54 S. Ct. 774, 78 L.Ed. 1476.

Senator Long contends that article 1, § 6, cl. 1 of the Constitution, confers upon every member of Congress, while in attendance within the District, immunity in civil cases not only from arrest, but also from service of process. Neither the Senate, nor the House of Representatives, has ever asserted such a claim in behalf of its members. Clause 1 defines the extent of the immunity. Its language is exact and leaves no room for a construction which would extend the privilege beyond the terms of the grant. In *Kimberly v. Butler*, Fed.Cas.No.7,777, Mr. Chief Justice Chase, sitting in the Circuit Court for the District of Maryland, held that the privilege was limited to exemption from arrest. Compare Mr. Justice Grier, sitting in the Circuit Court of the District of New Jersey in *Nones v. Edsall*, 1 Wall.Jr. 189, Fed.Cas.No. 10,290. The courts of the District of Columbia, where the question has been raised from time to time since 1868, have consistently denied the immunity asserted. *Merrick v. Giddings*, *McArthur & M.*, 11 D.C., 55, 67; *Howard v. Citizens' Bank & Trust Co.*, 12 App.D.C. 222. State cases passing on similar provisions so hold.

History confirms the conclusion that the immunity is limited to arrest. See opinion of Mr. Justice Wylie in *Merrick v. Giddings*. The cases cited in support of the contrary view rest largely upon doubtful notions as to the historic privileges of members of Parliament before the enactment in 1770 of the statute of 10 George III, c. 50. That act declared that members of Parliament should be subject to civil process, provided that they were not "arrested or imprisoned." When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies. *Williamson v. United States*, 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278.

The constitutional privilege here asserted must not be confused with the common-law rule that witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit, are immune from service in another. That rule of practice is founded upon the needs of the court, not upon the convenience or preference of the individuals concerned. And the immunity conferred by the court is extended or withheld as judicial necessities require. See *Lamb v. Schmitt*, 285 U.S. 222, 225, 226, 52 S.Ct. 317, 76 L.Ed. 720.

Affirmed.

## WRIGHT v. UNITED STATES.

Supreme Court of the United States, 1938. 302 U.S. 583, 58 S.Ct. 395,  
82 L.Ed. 439.

Proceeding by David A. Wright against the United States, involving a controversy as to whether a bill granting jurisdiction to the Court of Claims to rehear and adjudicate plaintiff's claim became a law. To review a judgment for the United States, plaintiff brings certiorari.

Affirmed.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

The question is whether Senate Bill 713, 74th Congress, 1st session, which was passed by both Houses of Congress, became a law.

The bill was presented to the President of the United States on Friday, April 24, 1936. It had originated in the Senate. On Monday, May 4, 1936, the Senate took a recess until noon, Thursday, May 7, 1936. The House of Representatives remained in session. On May 5, 1936, the President returned the bill with a message addressed to the Senate setting forth his objections. The bill and message were delivered to the Secretary of the Senate. When the Senate reconvened on May 7, 1936, the Secretary advised the Senate of the return of the bill and the delivery of the President's message. On the same day the President of the Senate laid before it the Secretary's letter and the message of the President of the United States. The message was read and with the bill was referred to the Senate Committee on Claims. No further action was taken.

The bill granted jurisdiction to the Court of Claims to rehear and adjudicate petitioner's claim against the United States. Accordingly, on September 14, 1936, petitioner presented his petition to the Court of Claims. The Government opposed the petition upon the ground that the bill had never become a law and the Court of Claims denied the petition. In view of the importance of the question certiorari was granted. 301 U.S. 681, 57 S.Ct. 939, 81 L.Ed. 1339.

The applicable provisions of the Constitution are found in article 1, § 7, par. 2, U.S.C.A.Const. art. 1, § 7, par. 2, which provides: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree

to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."

1. The first question is whether "the Congress by their adjournment" prevented the return of the bill by the President within the period of ten days allowed for that purpose.

"The Congress" did not adjourn. The Senate alone was in recess. The Constitution creates and defines "the Congress." It consists "of a Senate and House of Representatives." Article 1, § 1, U.S.C.A.Const. art. 1, § 1. The Senate is not "the Congress."

The context of the clause itself points the distinction. It speaks of the "House of Representatives" and of the "Senate," respectively. It speaks of the return of the bill, if the President does not approve it, "to that House in which it shall have originated"; of reconsideration by "that House," and, in case two thirds of "that House" agree to pass the bill, of sending it together with the President's objections to the "other House" and, if approved by two thirds of "that House," the bill is to become a law. Provision is made for the taking of the votes of "both Houses" and for the recording of the names of those voting for and against the bill on the Journal "of each House respectively."

Then, after this precise use of terms and careful differentiation, the concluding clause describes not an adjournment of either House as a separate body, or an adjournment of the House in which the bill shall have originated, but the adjournment of "the Congress." It cannot be supposed that the framers of the Constitution did not use this expression with deliberation or failed to appreciate its plain significance. The reference to the Congress is manifestly to the entire legislative body consisting of both Houses. Nowhere in the Constitution are the words "the Congress" used to describe a single House.

To disregard such a deliberate choice of words and their natural meaning would be a departure from the first principle of constitutional interpretation. "In expounding the Constitution of the United States," said Chief Justice Taney in *Holmes v. Jennison*, 14 Pet. 540, 570, 571, 614, 10 L.Ed. 579, "every word must have its due force, and appropriate meaning; for it is evident from the

whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood." See, also, *Martin v. Hunter's Lessee*, 1 Wheat. 304, 333, 334, 4 L.Ed. 97; *Ogden v. Saunders*, 12 Wheat. 213, 316, 6 L.Ed. 606; *Myers v. United States*, 272 U.S. 52, 151, 47 S.Ct. 21, 37, 71 L.Ed. 160; *Williams v. United States*, 289 U.S. 553, 572, 573, 53 S.Ct. 751, 757, 77 L.Ed. 1372.

The argument addressed to the word "their" in the phrase "the Congress by their adjournment," is futile. The argument is that the use of the plural would not be unusual or inappropriate if the reference were to a single House. There is no question that both singular and plural forms are used in the Constitution with reference to each House separately. See article 1, § 3, pars. 2, 4, 5, 6, U.S.C.A.Const. art. 1, § 3, pars. 2, 4, 5, 6; Article 1, § 5, pars. 1, 2, 3, U.S.C.A.Const. art. 1, § 5, pars. 1-3. The plural is used in the phrase "their Journal" in the paragraph under consideration. But the question is not whether the use of the plural is inappropriate in referring to a single House or its members. It is sufficient to say that there is certainly no inappropriateness in the use of the plural in relation to "the Congress" as composed of both Houses, and that use in no way changes the significance of that term.

The phrasing of the concluding clause is entirely free from ambiguity, and there is no occasion for construction.

2. The argument to the contrary rests upon the premise that a bill cannot be returned by the President to the House in which it originated when that House during the session of Congress is in recess, and hence that the concluding clause of paragraph 2 of section 7 of Article 1, referring to an adjournment by the Congress, should be rephrased by judicial construction in order to deal with that situation. We think that the premise is faulty and the rephrasing inadmissible.

Paragraph 4 of section 5 of article 1, U.S.C.A.Const. art. 1, § 5, par. 4, provides: "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting."

It will be observed that this provision is for a short recess by one House without the consent of the other "during the Session of Congress." Plainly the taking of such a recess is not

an adjournment by the Congress. The "Session of Congress" continues.

Here, the recess of the Senate from May 4th to May 7th was during the session of Congress and under that provision. In returning the bill to the Senate by delivery to its Secretary during the recess there was no violation of any express requirement of the Constitution. The Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return.

Nor was there any practical difficulty in making the return of the bill during the recess. The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive, the bill. Under the constitutional provision the Senate was required to reconvene in not more than three days and thus would be able to act with reasonable promptitude upon the President's objections. There is no greater difficulty in returning a bill to one of the two Houses when it is in recess during the session of Congress than in presenting a bill to the President by sending it to the White House in his temporary absence. Such a presentation is familiar practice. The bill is sent by a messenger and is received by the President. It is returned by a messenger, and why may it not be received by the accredited agent of the legislative body? To say that the President cannot return a bill when the House in which it originated is in recess during the session of Congress, and thus afford an opportunity for the passing of the bill over the President's objections, is to ignore the plainest practical considerations and by implying a requirement of an artificial formality to erect a barrier to the exercise of a constitutional right. \* \* \*

3. The chief, if not the sole, reliance for the argument that the bill could not be returned by the President during the Senate's recess is our decision in the Pocket Veto Case, *supra*. We do not regard that decision as applicable for two reasons: (1) The present question was not involved; and (2) the reasoning of the decision is inapposite to the circumstances of this case.

In the Pocket Veto Case, the Congress had adjourned. The question was whether the concluding clause of paragraph 2 of section 7 of article 1 was limited to a final adjournment of the Congress or embraced an adjournment of the Congress at the close of the first regular session. The Court held that the clause was not so limited and applied to the latter. In interpreting the word "adjournment," and in referring to other provisions of the Constitution using the word "adjourn," the Court was still addressing itself to a case where there had been an adjournment

by the Congress. The Court did not decide, and there was no occasion for ruling, that the clause applies where the Congress has not adjourned and a temporary recess has been taken by one House during the session of Congress. Any observations which could be regarded as having a bearing upon the question now before us would be taken out of their proper relation. The oft-repeated admonition of Chief Justice Marshall, "that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," and that if they go "beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision," has special force in this instance. *Cohens v. Virginia*, 6 Wheat. 264, 399, 5 L.Ed. 257.

In the Pocket Veto Case, the Court expressed the view that the House to which the bill is to be returned "is the House in session," and that no return can be made to the House when it is not in session as a collective body and its members are dispersed. But that expression should not be construed so narrowly as to demand that the President must select a precise moment when the House is within the walls of its chambers and that a return is absolutely impossible during a recess however temporary. Such a conclusion, as we shall presently endeavor to show, would frustrate the fundamental purposes of the constitutional provision as to action upon bills. The Court in the Pocket Veto Case was impressed with the impropriety of a delivery of the bill by the President during a period of adjournment "to some individual officer or agent not authorized to make any legislative record of its delivery, who should hold it in his own hands for days, weeks or perhaps months,—not only leaving open possible questions as to the date on which it had been delivered to him, or whether it had in fact been delivered to him at all, but keeping the bill in the meantime in a state of suspended animation until the House resumes its sittings, with no certain knowledge on the part of the public as to whether it had or had not been seasonably delivered, and necessarily causing delay in its reconsideration which the Constitution evidently intended to avoid." "In short," said the Court, "it was plainly the object of the constitutional provision that there should be a timely return of the bill, which should not only be a matter of official record definitely shown by the journal of the House itself, giving public, certain and prompt knowledge as to the status of the bill, but should enable Congress to proceed immediately with its reconsideration; and that the return of the bill should be an actual and public return to the House itself,

and not a fictitious return by a delivery of the bill to some individual which could be given a retroactive effect at a later date when the time for the return of the bill to the House had expired." *Id.*, 279 U.S. 655, at pages 684, 685, 49 S.Ct. 463, 468, 73 L.Ed. 894, 64 A.L.R. 1434.

These statements show clearly the sort of dangers which the Court envisaged. However real these dangers may be when Congress has adjourned and the members of its Houses have dispersed at the end of a session, the situation with which the Court was dealing, they appear to be illusory when there is a mere temporary recess. Each House for its convenience, and during its session and the session of Congress, may take, and frequently does take, a brief recess limited, as we have seen, in the absence of the consent of the other House, to a period of three days. In such case there is no withholding of the bill from appropriate legislative record for weeks or perhaps months, no keeping of the bill in a state of suspended animation with no certain knowledge on the part of the public whether it was seasonably delivered, no causing of any undue delay in its reconsideration. When there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interruption, the bill is properly safeguarded for a very limited time, and is promptly reported and may be reconsidered immediately after the short recess is over. The prospect that in such a case the public may not be promptly and properly informed of the return of the bill with the President's objections, or that the bill will not be properly safeguarded or duly recorded upon the journal of the House, or that it will not be subject to reasonably prompt action by the House, is, we think, wholly chimerical. If we regard the manifest realities of the situation, we cannot fail to see that a brief recess by one House, such as is permitted by the Constitution without the consent of the other House, during the session of Congress, does not constitute such an interruption of the session of the House as to give rise to the dangers which, as the Court apprehended, might develop after the Congress has adjourned.

4. The constitutional provisions have two fundamental purposes; (1) That the President shall have suitable opportunity to consider the bills presented to him; and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes. *Edwards v. United States*, 286 U.S. 482, 486, 52 S.Ct. 627, 628, 76 L.Ed. 1239. We should not adopt a construction which would frustrate either of these purposes.

As to the President's opportunity for consideration, we have held that he may still approve bills and that they will become laws, if he acts within the time allotted for that purpose, although Congress meanwhile has adjourned. *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 20 S.Ct. 168, 44 L. Ed. 223; *Edwards v. United States*, *supra*. It is to safeguard the President's opportunity that paragraph 2 of section 7 of article 1 provides that bills which he does not approve shall not become laws if the adjournment of the Congress prevents their return. *Edwards v. United States*, *supra*.

Where the President does not approve a bill, the plan of the Constitution is to give to the Congress the opportunity to consider his objections and to pass the bill despite his disapproval. It is for this purpose that the time limit for return is fixed. This opportunity is as important as that of the President. But if the return of a bill is impossible during a temporary recess of a House while Congress is in session, either the President may be obliged to cut short the time for his consideration so as to be sure to get his objections before the House while it is within the walls of its chambers, or, if the President takes the allotted time and attempts to return the bill during the recess, his objections will either be unavailing or the Congress will be denied opportunity to pass upon them. If, as we think, the concluding words of paragraph 2 of section 7 are inapplicable then, as Congress has not adjourned, the bill, if not deemed to have been returned, will become a law despite the President's disapproval. Or, if that clause were deemed applicable and the return of the bill be considered to have been prevented by the recess, the bill would not become a law and Congress, although in session, would not be able to pass the bill over the President's objections.

The extremely technical character of the argument which would make impossible the return of a bill because a House has taken a temporary recess is manifest. Suppose the President, who is clearly entitled to his ten days for consideration, sends the bill to the House in which it originated with his objections on the afternoon of the tenth day, but that House has adjourned at noon on that day until the following morning. Then, on the argument now advanced as to the construction of the concluding clause of paragraph 2 of section 7, the bill would not become a law and the objections of the President would operate practically as an absolute veto, although the Congress was in session and ready to consider his objections. Or if that result does not follow, in the view that the clause does not apply because Congress has not adjourned, then, if the bill is not regarded as returned, it becomes a law although the President has shown his

disapproval within the ten days. These difficulties disappear if we dispense with wholly unnecessary technicalities as to the method of return and give effect to realities.

We agree with the government that the precedents of executive action which have been cited are not persuasive. The question now raised has not been the subject of judicial decision and must be resolved not by past uncertainties, assumptions, or arguments, but by the application of the controlling principles of constitutional interpretation.

We are not impressed by the argument that while a recess of one House is limited to three days without the consent of the other House, cases may arise in which the other House consents to an adjournment and a long period of adjournment may result. We have no such case before us, and we are not called upon to conjecture as to the nature of the action which might be taken by the Congress in such a case, or what would be its effect.

We hold that where the Congress has not adjourned and the House in which the bill originated is in recess for not more than three days under the constitutional permission while Congress is in session, the bill does not become a law if the President has delivered the bill with his objections to the appropriate officer of the House within the prescribed ten days, and the Congress does not pass the bill over his objections by the requisite votes. In this instance the bill was properly returned by the President, it was open to reconsideration in Congress, and it did not become a law.

The judgment is affirmed.

Mr. Justice CARDOZO took no part in the decision of this case. (Messrs. Justices STONE and BRANDEIS dissented in part.)

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#### NOTE

1. Other cases dealing with the President's veto power, and the effect of his failure to act on bills within the constitutionally prescribed period, are *Okanagan v. U. S.*, 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894 (1929); *Edwards v. U. S.*, 286 U.S. 482, 52 S.Ct. 627, 76 L.Ed. 1239 (1932); *La Abra Silver Mining Co. v. U. S.*, 175 U.S. 423, 20 S.Ct. 168, 44 L.Ed. 223 (1899); *Missouri Pac. Ry. Co. v. Kansas*, 248 U.S. 276, 39 S.Ct. 93, 63 L.Ed. 482 (1919).

## JURNEY v. MacCRACKEN.

Supreme Court of the United States, 1935. 294 U.S. 125, 55 S.Ct. 375,  
79 L.Ed. 802.

Mr. Justice BRANDEIS delivered the opinion of the Court.

This petition for a writ of habeas corpus was brought in the Supreme Court of the District of Columbia by William P. MacCracken, Jr., against Chesley W. Journey, the Sergeant at Arms of the Senate of the United States. The writ issued; the body of the petitioner was produced before that court; and the case was then heard on demurrer to the petition. The trial court discharged the writ and dismissed the petition. The Court of Appeals, two justices dissenting, reversed that judgment and remanded the case to the Supreme Court of the District, with directions to discharge the prisoner from custody. 63 App.D.C. 342, 72 F.2d 560. This Court granted certiorari because of the importance of the question presented. 293 U.S. 543, 55 S.Ct. 113, 79 L.Ed. 648.

The petition alleges that MacCracken was, on February 12, 1934, arrested, and is held, under a warrant issued on February 9, 1934, after MacCracken had respectfully declined to appear before the bar of the Senate in response to a citation served upon him pursuant to Resolution 172, adopted by the Senate on February 5, 1934. The resolution provides:

"Resolved, That the President of the Senate issue a citation directing William P. MacCracken, Jr., L. H. Brittin, Gilbert Given, and Harris M. Hanshue to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memorandums from the files of William P. MacCracken, Jr., after a subpoena had been served upon William P. MacCracken, Jr., as shown by the report of the Special Senate Committee Investigating Ocean and Air Mail Contracts."

It is conceded that the Senate was engaged in an inquiry which it had the constitutional power to make; that the committee had authority to require the production of papers as a necessary incident of the power of legislation; and that the Senate had the power to coerce their production by means of arrest. *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1. No question is raised as to the propriety of the scope of the subpoena duces tecum, or as to the regularity of any of the proceedings which preceded the arrest. The claim of privilege hereinafter referred to is no longer an issue. MacCracken's sole contention is that the Senate was without

power to arrest him with a view to punishing him, because the act complained of—the alleged destruction and removal of the papers after service of the subpoena—was “the past commission of a completed act which prior to the arrest and the proceedings to punish had reached such a stage of finality that it could not longer affect the proceedings of the Senate or any Committee thereof, and which, and the effects of which, had been undone long before the arrest.”

The petition occupies, with exhibits, 100 pages of the printed record in this Court; but the only additional averments essential to the decision of the question presented are, in substance, these: The Senate had appointed the special committee to make “a full, complete and detailed inquiry into all existing contracts entered into by the Postmaster General for the carriage of air mail and ocean mail.” MacCracken had been served, on January 31, 1934, with a subpoena duces tecum to appear “instantly” before the committee and to bring all books of account and papers “relating to air mail and ocean mail contracts.” The witness appeared on that day; stated that he is a lawyer, member of the firm of MacCracken & Lee, with offices in the District; that he was ready to produce all papers which he lawfully could; but that many of those in his possession were privileged communications between himself and corporations or individuals for whom he had acted as attorney; that he could not lawfully produce such papers without the client first having waived the privilege; and that, unless he secured such a waiver, he must exercise his own judgment as to what papers were within the privilege. He gave, however, to the committee the names of these clients; stated the character of services rendered for each; and, at the suggestion of the committee, telegraphed to each asking whether consent to disclose confidential communications would be given. From some of the clients he secured immediately unconditional consent; and on February 1 produced all the papers relating to the business of the clients who had so consented.

On February 2, before the committee had decided whether the production of all the papers should be compelled despite the claims of privilege, MacCracken again appeared and testified as follows: On February 1 he personally permitted Given, a representative of Western Air Express, to examine, without supervision, the files containing papers concerning that company; and authorized him to take therefrom papers which did not relate to air mail contracts. Given, in fact, took some papers which did relate to air mail contracts. On the same day, Brittin, vice president of Northwest Airways, Inc., without Mac-

Cracken's knowledge, requested and received from his partner Lee permission to examine the files relating to that company's business and to remove therefrom some papers stated by Brittin to have been dictated by him in Lee's office and to be wholly personal and unrelated to matters under investigation by the committee. Brittin removed from the files some papers; took them to his office; and, with a view to destroying them, tore them into pieces and threw the pieces into a waste paper basket.

Upon the conclusion of MacCracken's testimony on February 2, the committee decided that none of the papers in his possession could be withheld under the claim of privilege. Later that day MacCracken received from the rest of his clients waivers of their privilege; and thereupon promptly made available to the committee all the papers then remaining in the files. On February 3 (after a request therefor by MacCracken), Givven restored to the files what he stated were all the papers taken by him. The petition does not allege that any of the papers taken by Brittin were later produced. It avers that, prior to the adoption of the citation for contempt under Resolution 172, MacCracken had produced and delivered to the Senate of the United States, "to the best of his ability, knowledge and belief, every paper of every kind and description in his possession or under his control, relating in any way to air mail and ocean mail contracts; [and that] on February 5, 1934 \* \* \* all of said papers were turned over and delivered to said Senate Committee and since that date they have been, and they now are, in the possession of said Committee."

First. The main contention of MacCracken is that the so-called power to punish for contempt may never be exerted, in the case of a private citizen, solely qua punishment. The argument is that the power may be used by the legislative body merely as a means of removing an existing obstruction to the performance of its duties; that the power to punish ceases as soon as the obstruction has been removed, or its removal has become impossible; and hence that there is no power to punish a witness who, having been requested to produce papers, destroys them after service of the subpoena. The contention rests upon a misconception of the limitations upon the power of the Houses of Congress to punish for contempt. It is true that the scope of the power is narrow. No act is so punishable unless it is of a nature to obstruct the performance of the duties of the Legislature. There may be lack of power, because, as in *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377, there was no legislative duty to be performed, or because, as in *Marshall v. Gordon*, 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881, L.R.A.1917F, 279,

Ann.Cas.1918B, 371, the act complained of is deemed not to be of a character to obstruct the legislative process. But, where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible, is without legal significance.

The power to punish a private citizen for a past and completed act was exerted by Congress as early as 1795; and since then it has been exercised on several occasions. It was asserted, before the Revolution, by the colonial assemblies, in imitation of the British House of Commons; and afterwards by the Continental Congress and by state legislative bodies. In *Anderson v. Dunn*, 6 Wheat. 204, 5 L.Ed. 242, decided in 1821, it was held that the House had power to punish a private citizen for an attempt to bribe a member. No case has been found in which an exertion of the power to punish for contempt has been successfully challenged on the ground that, before punishment, the offending act had been consummated or that the obstruction suffered was irremediable. The statements in the opinion in *Marshall v. Gordon*, *supra*, upon which *MacCracken* relies, must be read in the light of the particular facts. It was there recognized that the only jurisdictional test to be applied by the court is the character of the offense; and that the continuance of the obstruction, or the likelihood of its repetition, are considerations for the discretion of the legislators in meting out the punishment.

Here, we are concerned, not with an extension of congressional privilege, but with vindication of the established and essential privilege of requiring the production of evidence. For this purpose, the power to punish for a past contempt is an appropriate means. Compare *Ex parte Nugent*, Fed.Cas. No. 10,375; *Stewart v. Blaine*, 1 MacArthur (8 D.C.) 453. The apprehensions expressed from time to time in congressional debates, in opposition to particular exercises of the contempt power, concerned, not the power to punish, as such, but the broad, undefined privileges which it was believed might find sanction in that power. The ground for such fears has since been effectively removed by the decisions of this Court which hold that assertions of congressional privilege are subject to judicial review, *Kilbourn v. Thompson*, *supra*; and that the power to punish for contempt may not be extended to slanderous attacks which present no immediate obstruction to legislative processes, *Marshall v. Gordon*, *supra*.

Second. The power of either House of Congress to punish for contempt was not impaired by the enactment in 1857 of the statute, Rev.St. § 102, 2 U.S.C.A. § 192, making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor. Compare *Sinclair v. United States*, 279 U.S. 263, 49 S.Ct. 268, 73 L.Ed. 692. The statute was enacted, not because the power of the Houses to punish for a past contempt was doubted, but because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses. That the purpose of the statute was merely to supplement the power of contempt by providing for additional punishment was recognized in *In re Chapman*, 166 U.S. 661, 671, 672, 17 S.Ct. 677, 681, 41 L.Ed. 1154: "We grant that congress could not divest itself, or either of its houses, of the essential and inherent power to punish for contempt, in cases to which the power of either house properly extended; but because congress, by the act of 1857, sought to aid each of the houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved, and the statute is not open to objection on that account." Punishment, purely as such, through contempt proceedings, legislative or judicial, is not precluded because punishment may also be inflicted for the same act as a statutory offense. Compare *Ex parte Hudgings*, 249 U.S. 378, 382, 39 S.Ct. 337, 63 L.Ed. 656, 11 A.L.R. 333. As was said in *In re Chapman*, *supra*, "the same act may be an offense against one jurisdiction and also an offense against another; and indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu*, and capable of standing together."

Third. MacCracken contends that he is not punishable for contempt, because the obstruction, if any, which he caused to legislative processes, had been entirely removed and its evil effects undone before the contempt proceedings were instituted. He points to the allegations in the petition for habeas corpus that he had surrendered all papers in his possession; that he was ready and willing to give any additional testimony which the committee might require; that he had secured the return of the papers taken from the files by Givven, with his permission; and that he was in no way responsible for the removal and destruction of the papers by Brittin. This contention goes to the question of guilt, not to that of the jurisdiction of the Senate. The contempt with which MacCracken is charged is "the destruction and removal of certain papers." Whether he

is guilty, and whether he has so far purged himself of contempt that he does not now deserve punishment, are the questions which the Senate proposes to try. The respondent to the petition did not, by demurring, transfer to the court the decision of those questions. The sole function of the writ of habeas corpus is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes. Compare *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867; *Henry v. Henkel*, 235 U.S. 219, 35 S.Ct. 54, 59 L.Ed. 203; *In re Gregory*, 219 U.S. 210, 31 S.Ct. 143, 55 L.Ed. 184.

The judgment of the Court of Appeals should be reversed; and that of the Supreme Court of the District should be affirmed.  
Reversed.

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.

### NOTE

1. An extended discussion of the power of each house of Congress to implement its investigatory powers by exercising its contempt powers over non-members is found in *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927). For earlier cases see *Anderson v. Dunn*, 6 Wheat. 204, 5 L.Ed. 242 (1821); *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881). See J. M. Landis, *Constitutional Limits on Congressional Power of Investigation*, 40 *Harv.L.Rev.* 153 (1926); C. S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 *U.Pa.L.Rev.* 691, 780 (1926). For discussion of Congress' power to compel appearance of members of the Executive Department, see Charles Warren, *Presidential Declarations of Independence*, 10 *Boston U.L.Rev.* 1 (1930).

2. For a case holding unauthorized an attempt by the House of Representatives to punish a non-member for intemperate criticisms of one of its committees, see *Marshall v. Gordon*, 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881 (1917).

3. Congress may legislate to make refusal to testify before its committees a crime as an alternative to resort to the contempt power of each of its houses, *In re Chapman*, 163 U.S. 661, 17 S.Ct. 677, 41 L.Ed. 1154 (1897); *Sinclair v. U. S.*, 279 U.S. 263, 49 S.Ct. 268, 73 L.Ed. 692 (1929).

4. The extent to which the provisions of the First Amendment limit the houses of Congress in their investigatory powers is discussed in *U. S. v. Josephson*, 165 F.2d 82 (C.C.A.N.Y.1948); certiorari denied, — U.S. —, 68 S.Ct. 609, 92 L.Ed. — (1948). See Note, *Constitutional Limitations on the Un-American Activities Committee*, 47 *Col.L.Rev.* 416 (1947); Comment, *Constitutional Law-Investigatory Powers of Congress—Validity of Un-American Activities Committee*, 46 *Mich.L.Rev.* 521 (1948).

5. The houses of the legislatures of the several states are held to possess a similar power to that possessed by the houses of Congress, *People ex rel. McDonald v. Keeler*, 99 N.Y. 463, 2 N.E. 615 (1885); *Greenfield v. Russell*, 292 Ill. 392, 127 N.E. 102 (1920).

## McCULLOCH v. MARYLAND.

Supreme Court of the United States, 1819. 4 Wheat. 316, 4 L.Ed. 579.

[Error to the Court of Appeals of Maryland. In 1816 Congress incorporated the Bank of the United States, and one of its branches was in 1817 established at Baltimore. In 1818 a Maryland statute subjected all banks in the state not chartered by the legislature to a stamp tax upon their note issues. McCulloch, cashier of the said branch bank, was held by the state courts liable to penalties for violating this act, and this writ was taken.]

Mr. Chief Justice MARSHALL. \* \* \* The first question made in the cause is, has Congress power to incorporate a bank? \* \* \* In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the Constitution was, indeed, elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state, by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union,

establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negated, by the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

It has been said, that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the Confederation, the state sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. \* \* \*

If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow oth-

ers to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it.

\* \* \*

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the tenth amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people"; thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment, had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the first article, U.S.C.A.Const. art. 1, § 9, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to

regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

\* \* \*

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither

sovereign with respect to the objects committed to the other. \* \* \* We cannot well comprehend the process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof."

The counsel for the state of Maryland has urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers. \* \* \* The argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory.

That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the tenth section of the first article of the Constitution, U.S.C.A. Const. art. 1, § 10. It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary" by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence

could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. \* \* \*

So, with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the Constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The several powers of Congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is, indeed essential to the beneficial exercise of the power, but not indispensably necessary to its

existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the Constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law, why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used in this clause of the Constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the state of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland, is founded on the intention of the convention, as manifested in the whole clause: \* \* \* 1. The clause is placed among the powers of Congress, not among the limitations on those powers. 2. Its terms purport to enlarge, not to dimin-

ish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. \* \* \*

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. \* \* \* If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. \* \* \* But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. \* \* \*

After this declaration, it can scarcely be necessary to say, that the existence of state banks can have no possible influence on the question. No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers as-

signed to it. \* \* \* The choice of means implies a right to choose a national bank in preference to state banks, and Congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land. \* \*

[The law of Maryland was then held void. This part of the case is printed ante, p. 96.]

Judgment reversed.

### NOTE

1. In *U. S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936), Mr. Justice Sutherland distinguished federal power in respect to foreign affairs from that with respect to internal affairs in the following language: "The two classes are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. That this doctrine applies only to powers which the states had, is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. \* \* \* When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. \* \* \* It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." See D. M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *Yale L.Jour.* 467 (1946).

2. Const.U.S., Amend. 10, provides that "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people." Frequently treated as an independent restriction on federal powers, it is now held to be merely declaratory of the relationships between the federal government and the states established by the original Constitution; see *U. S. v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.

Ed. 609 (1941); cf. view of Justices Douglas and Black in dissenting opinion in *New York v. U. S.*, 326 U.S. 572, 66 S.Ct. 310, 90 L. Ed. 326 (1946). See A. H. Feller, *The Tenth Amendment Retires*, 27 *Am.Bar Ass'n Jour.* 223 (1941).

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STURGES v. CROWNINSHIELD, 1819, 4 Wheat. 122, 192, 193, 195, 196, 4 L.Ed. 529, Mr. Chief Justice MARSHALL [sustaining the power of the states to pass bankruptcy laws in the absence of conflicting congressional legislation]:

"It must be recollected that, previous to the formation of the new Constitution, we were divided into independent states, united for some purposes, but, in most respects, sovereign. These states could exercise almost every legislative power, and, among others, that of passing bankrupt laws. When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed, not from the people of America, but from the people of the several states; and remain, after the adoption of the Constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been, that the mere grant of a power to Congress did not imply a prohibition on the states to exercise the same power. But it has never been supposed, that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it.

"Is the power to establish uniform laws on the subject of bankruptcies, throughout the United States, of this description? \* \* It is obvious that much inconvenience would result from that construction of the Constitution, which should deny to the state legislatures the power of acting on this subject, in consequence of the grant of Congress. It may be thought more convenient that much of it should be regulated by state legislation, and Congress may purposely omit to provide for many cases to which their power extends. It does not appear to be a violent construction of the Constitution, and is certainly a convenient

one, to consider the power of the states as existing over such cases as the laws of the Union may not reach. But be this as it may, the power granted to Congress may be exercised or declined as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states."

## CHAPTER 7

### FEDERAL TAXING AND OTHER FISCAL POWERS

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#### UNITED STATES v. CONSTANTINE.

Supreme Court of the United States, 1935.  
296 U.S. 287, 56 S.Ct. 223, 80 L.Ed. 233.

Mr. Justice ROBERTS delivered the opinion of the Court.

In November, 1934, an information was filed in the District Court for Northern Alabama charging that on October 8, 1934, at Birmingham, Ala., the respondent conducted the business of a retail dealer in malt liquor contrary to the laws of the state, without having paid the special excise tax of \$1,000 imposed by section 701 of the Revenue Act of 1926. A demurrer and a motion to quash were overruled, a plea of not guilty was entered, and a jury trial was waived. Pursuant to a stipulation of facts, the court found that for the fiscal year July 1, 1934, to June 30, 1935, the respondent registered with the collector of internal revenue as a retail liquor dealer and paid the tax of \$25.00 imposed upon such dealers by Rev.St. § 3244, as amended; on the date named in the information the respondent had a restaurant in Birmingham, where he conducted the business of a retail dealer in malt liquors containing more than one-half of one percent alcohol, which business was contrary to the laws of the state and of the city; and had not paid the \$1,000 tax. Respondent's motion for judgment was denied, that of the United States was granted, and the respondent was sentenced. The Circuit Court of Appeals reversed the judgment on the ground that the section became inoperative upon the repeal of the Eighteenth Amendment.

In its petition for certiorari the United States, though admitting the absence of a conflicting decision by the Circuit Court of Appeals of any other circuit, called attention to diverse decisions in the District Courts, to the many other cases pending in which action is awaiting authoritative settlement of the question presented herein, to the large amount of money involved, and to the number of persons whose liability will remain uncertain until the dispute is finally settled. The question thus assumes the importance required by Rule 38 and the writ issued accordingly.

In concluding that the law imposed a penalty in aid of the enforcement of the Eighteenth Amendment, and therefore fell with its repeal, the court relied upon the legislative history and administrative interpretation of section 701, and also thought such a construction necessary to avoid a serious question under article 1, § 8, of the Constitution as to the uniformity of operation of the act throughout the United States. The government insists that the section was not a part of the machinery for enforcing the prohibition amendment, but a revenue measure levying an excise conformably to the Constitution. \* \* \*

Third. The repeal of the Eighteenth Amendment renders it necessary to determine whether the exaction is in fact a tax or a penalty. If it was laid to raise revenue its validity is beyond question notwithstanding the fact that the conduct of the business taxed was in violation of law. The United States has the power to levy excises upon occupations, and to classify them for this purpose; and need look only to the fact of the exercise of the occupation or calling taxed, regardless of whether such exercise is permitted or prohibited by the laws of the United States or by those of a state. The burden of the tax may be imposed alike on the just and the unjust. It would be strange if one carrying on a business the subject of an excise should be able to excuse himself from payment by the plea that in carrying on the business he was violating the law. The rule has always been otherwise. The tax imposed by Rev.St. § 3244, as amended, affords an opposite illustration. That act imposes an excise, varying in amount, upon different forms of the liquor traffic. The respondent paid the annual tax of \$25 thereby required, despite the fact that he was violating local law in prosecuting his business. Undoubtedly this was a true tax for which he was liable. The question is whether the exaction of \$1,000 in addition, by reason solely of his violation of state law, is a tax or a penalty. If, as the court below thought, section 701 was part of the enforcing machinery under the Amendment, it automatically fell at the moment of repeal.

But even though the statute was not adopted to penalize violations of the amendment, it ceased to be enforceable at the date of repeal, if, in fact, its purpose is to punish rather than to tax. The only color for the assertion of congressional power to ordain a penalty for violation of state liquor laws is the Eighteenth Amendment, which gave to the federal government power to enforce nation-wide prohibition. That has been recalled; and the case must be decided in the light of constitutional principles which would have been applicable had the Amendment never

been adopted. In the acts which have carried the provision, the item is variously denominated an occupation tax, an excise tax, and a special tax. If in reality a penalty it cannot be converted into a tax by so naming it, and we must ascribe to it the character disclosed by its purpose and operation, regardless of name. Disregarding the designation of the exaction, and viewing its substance and application, we hold that it is a penalty for the violation of state law, and as such beyond the limits of federal power.

Since 1878, the revised statutes have classified various forms of the liquor traffic for the payment of excises differing in amount according to the nature of the business. When the section exacting \$1,000 additional from all persons engaged in the traffic in violation of state law was made a part of the revenue laws, the amount of the tax due by the respondent under Rev. St. § 3244, as amended, was \$25. The so-called excise of \$1,000 is forty times as great. It is ten times as great as the annual tax under Rev. St. § 3244, as amended, for wholesale liquor dealers and brewers, and fifty times as great as that imposed upon dealers in malt liquors. If the imposts under Rev. St. § 3244, as amended, were fixed in amount in accordance with the importance of the business or supposed ability to pay, the exaction in question is highly exorbitant. This fact points in the direction of a penalty rather than a tax.

The condition of the imposition is the commission of a crime. This, together with the amount of the tax, is again significant of penal and prohibitory intent rather than the gathering of revenue. Where, in addition to the normal and ordinary tax fixed by law, an additional sum is to be collected by reason of conduct of the taxpayer violative of the law, and this additional sum is grossly disproportionate to the amount of the normal tax, the conclusion must be that the purpose is to impose a penalty as a deterrent and punishment of unlawful conduct.

We conclude that the indicia which the section exhibits of an intent to prohibit and to punish violations of state law as such are too strong to be disregarded, remove all semblance of a revenue act and stamp the sum it exacts as a penalty. In this view the statute is a clear invasion of the police power, inherent in the states, reserved from the grant of powers to the federal government by the Constitution.

We think the suggestion has never been made—certainly never entertained by this Court—that the United States may impose cumulative penalties above and beyond those specified by state law for infractions of the state's criminal code by its own citizens.

The affirmation of such a proposition would obliterate the distinction between the delegated powers of the federal government and those reserved to the states and to their citizens. The implications from a decision sustaining such an imposition would be startling. The concession of such a power would open the door to unlimited regulation of matters of state concern by federal authority. The regulation of the conduct of its own citizens belongs to the state, not to the United States. The right to impose sanctions for violations of the state's laws inheres in the body of its citizens speaking through their representatives. So far as the reservations of the Tenth Amendment were qualified by the adoption of the Eighteenth the qualification has been abolished.

Reference was made in the argument to decisions of this Court holding that where the power to tax is conceded the motive for the exaction may not be questioned. These are without relevance to the present case. The point here is that the exaction is in no proper sense a tax but a penalty imposed in addition to any the state may decree for the violation of a state law. The cases cited dealt with taxes concededly within the realm of the federal power of taxation. They are not authority where, as in the present instance, under the guise of a taxing act the purpose is to usurp the police powers of the state.

In view of what has been said we do not consider the contention that the law is bad for want of the uniformity of operation required by article 1, § 8, of the Constitution.

The judgment is affirmed.

Mr. Justice CARDOZO.

I think the judgment should be reversed. \* \* \*

The judgment of the court, if I interpret the reasoning aright, does not rest upon a ruling that Congress would have gone beyond its power if the purpose that it professed was the purpose truly cherished. The judgment of the court rests upon the ruling that another purpose, not professed, may be read beneath the surface, and by the purpose so imputed the statute is destroyed. Thus the process of psychoanalysis has spread to unaccustomed fields. There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful. *Fletcher v. Peck*, 6 Cranch, 87, 130, 3 L.Ed. 162; *Magnano Co. v. Hamilton*, 292 U.S. 40, 44, 54 S.Ct. 599, 78 L.Ed. 1109. There is another wise and ancient doctrine that a court will not adjudge the invalidity of a statute except for manifest necessity. Every reasonable doubt must

have been explored and extinguished before moving to that grave conclusion. *Ogden v. Saunders*, 12 Wheat. 213, 270, 6 L.Ed. 606. The warning sounded by this court in the *Sinking Fund Cases* (*Union P. R. Co. v. U. S.*), 99 U.S. 700, 718, 25 L.Ed. 496, has lost none of its significance. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." I cannot rid myself of the conviction that in the imputation to the lawmakers of a purpose not professed, this salutary rule of caution is now forgotten or neglected after all the many protestations of its cogency and virtue.

Mr. Justice BRANDEIS and Mr. Justice STONE join in this opinion.

#### NOTE

1. Taxation is inevitably a form of regulation, even though the sole or principal purpose of its levy was to raise revenue. Cases sustaining federal taxes against the claim that they were invalid because the principal purpose was the regulation of matters which the federal government had no power to regulate, include *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L.Ed. 482 (1869); *McCray v. U. S.*, 195 U.S. 27, 24 S.Ct. 729, 49 L.Ed. 78 (1904); *Sonzinsky v. U. S.*, 300 U.S. 506, 57 S.Ct. 554, 81 L.Ed. 772 (1937). Cases invalidating federal taxes, prior to the reported case, include *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822 (1922); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817 (1922); *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936). See C. M. Hough, *Covert Legislation and the Constitution*, 30 *Harv.L.Rev.* 801 (1917); R. E. Cushman, *Social and Economic Control through Federal Taxation*, 18 *Minn.L.Rev.* 759 (1934); W. A. Sutherland, *The Child Labor Cases and the Constitution*, 8 *Corn.L.Quar.* 338 (1923).

2. For a case in which a complicated regulatory system of the traffic in narcotics was sustained as a proper means for collection of a rather nominal tax, see *U. S. v. Doremus*, 249 U.S. 86, 39 S.Ct. 214, 63 L.Ed. 493 (1919); see also *Nigro v. U. S.*, 276 U.S. 332, 48 S.Ct. 388, 72 L.Ed. 600 (1928).

3. The protective tariff system has been held valid, *J. W. Hampton, Jr. & Co. v. U. S.*, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624 (1928).

4. The increased scope of federal regulatory powers since 1936 has decreased the possibilities of successfully contesting a federal tax on the basis that its purpose was the regulation of matters beyond the scope of federal control. The Supreme Court has not held any federal tax invalid on that basis after 1936.

## UNITED STATES v. BUTLER.

Supreme Court of the United States, 1936.  
297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477.

Mr. Justice ROBERTS delivered the opinion of the Court.

In this case we must determine whether certain provisions of the Agricultural Adjustment Act, 1933, conflict with the Federal Constitution.

Title 1 of the statute is captioned "Agricultural Adjustment." Section 1 (7 U.S.C.A. § 601) recites that an economic emergency has arisen, due to disparity between the prices of agricultural and other commodities, with consequent destruction of farmers' purchasing power and breakdown in orderly exchange, which, in turn, have affected transactions in agricultural commodities with a national public interest and burdened and obstructed the normal currents of commerce, calling for the enactment of legislation.

Section 2 (7 U.S.C.A. § 602) declares it to be the policy of Congress:

"To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period."

The base period, in the case of cotton, and all other commodities except tobacco, is designated as that between August, 1909, and July, 1914.

The further policies announced are an approach to the desired equality by gradual correction of present inequalities "at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets," and the protection of consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities or products derived therefrom, which is returned to the farmer, above the percentage returned to him in the base period.

Section 8 (48 Stat. 34) provides, amongst other things, that, "In order to effectuate the declared policy," the Secretary of Agriculture shall have power

"(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural

commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments. \* \* \*

"(2) To enter into marketing agreements with processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce of any agricultural commodity or product thereof, after due notice and opportunity for hearing to interested parties. \* \* \*

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof."

It will be observed that the Secretary is not required, but is permitted, if, in his uncontrolled judgment, the policy of the act will so be promoted, to make agreements with individual farmers for a reduction of acreage or production upon such terms as he may think fair and reasonable.

Section 9(a), 48 Stat. 35 enacts:

"To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor."

The Secretary may from time to time, if he finds it necessary for the effectuation of the policy of the act, readjust the amount of the exaction to meet the requirements of subsection (b). The tax is to terminate at the end of any marketing year if the rental or benefit payments are discontinued by the Secretary with the expiration of that year.

Section 9(b), 7 U.S.C.A. § 609(b), fixes the tax "at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value," with power in the Secretary, after investigation, notice, and hearing, to read-

just the tax so as to prevent the accumulation of surplus stocks and depression of farm prices.

Section 9(c), 7 U.S.C.A. § 609(c), directs that the fair exchange value of a commodity shall be such a price as will give that commodity the same purchasing power with respect to articles farmers buy as it had during the base period, and that the fair exchange value and the current average farm price of a commodity shall be ascertained by the Secretary from available statistics in his department.

Section 12(a), 7 U.S.C.A. § 612(a), appropriates \$100,000,000 "to be available to the Secretary of Agriculture for administrative expenses under this title [chapter] and for rental and benefit payments;" and Section 12(b), 7 U.S.C.A. § 612(b), appropriates the proceeds derived from all taxes imposed under the act "to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products. \* \* \* Administrative expenses, rental and benefit payments, and refunds on taxes."

Section 15(d), 7 U.S.C.A. § 615(d), permits the Secretary, upon certain conditions, to impose compensating taxes on commodities in competition with those subject to the processing tax.

By section 16 (see 7 U.S.C.A. § 616) a floor tax is imposed upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied in amount equivalent to that of the processing tax which would be payable with respect to the commodity from which the article is processed if the processing had occurred on the date when the processing tax becomes effective.

On July 14, 1933, the Secretary of Agriculture, with the approval of the President, proclaimed that he had determined rental and benefit payments should be made with respect to cotton; that the marketing year for that commodity was to begin August 1, 1933; and calculated and fixed the rates of processing and floor taxes on cotton in accordance with the terms of the act.

The United States presented a claim to the respondents as receivers of the Hoosac Mills Corporation for processing and floor taxes on cotton levied under sections 9 and 16 of the act. The receivers recommended that the claim be disallowed. The District Court found the taxes valid and ordered them paid. Upon appeal the Circuit Court of Appeals reversed the order. The judgment under review was entered prior to the adoption of the amending act of August 24, 1935, and we are therefore concerned only with the original act.

[The Court then discussed the taxpayer's right to sue, and sustained it.]

Second. The government asserts that even if the respondents may question the propriety of the appropriation embodied in the statute, their attack must fail because article 1, § 8 of the Constitution, authorizes the contemplated expenditure of the funds raised by the tax. This contention presents the great and the controlling question in the case. We approach its decision with a sense of our grave responsibility to render judgment in accordance with the principles established for the governance of all three branches of the government. \* \* \*

The clause thought to authorize the legislation, the first, confers upon the Congress power "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. \* \* \*" It is not contended that this provision grants power to regulate agricultural production upon the theory that such legislation would promote the general welfare. The government concedes that the phrase "to provide for the general welfare" qualifies the power "to lay and collect taxes." The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that, if it were adopted, "it is obvious that under color of the generality of the words, to 'provide for the common defence and general welfare', the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers." The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare.

Nevertheless, the government asserts that warrant is found in this clause for the adoption of the Agricultural Adjustment Act. The argument is that Congress may appropriate and authorize the spending of moneys for the "general welfare"; that the phrase should be liberally construed to cover anything conducive to national welfare; that decision as to what will promote such welfare rests with Congress alone, and the courts may not review its determination; and, finally, that the appropriation under attack was in fact for the general welfare of the United States.

The Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation may be expended only through appropriation. Article 1, § 9, cl. 7. They can never accomplish the objects for which they were collected, unless the power to appropriate is as broad

as the power to tax. The necessary implication from the terms of the grant is that the public funds may be appropriated "to provide for the general welfare of the United States." These words cannot be meaningless, else they would not have been used. The conclusion must be that they were intended to limit and define the granted power to raise and to expend money. How shall they be construed to effectuate the intent of the instrument?

Since the foundation of the nation, sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

But the adoption of the broader construction leaves the power to spend subject to limitations.

As Story says: "The Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers."

Again he says: "A power to lay taxes for the common defence and general welfare of the United States is not in common sense

a general power. It is limited to those objects. It cannot constitutionally transcend them."

That the qualifying phrase must be given effect all advocates of broad construction admit. Hamilton, in his well known Report on Manufactures, states that the purpose must be "general, and not local." Monroe, an advocate of Hamilton's doctrine, wrote: "Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not." Story says that if the tax be not proposed for the common defense or general welfare, but for other objects wholly extraneous, it would be wholly indefensible upon constitutional principles. And he makes it clear that the powers of taxation and appropriation extend only to matters of national, as distinguished from local, welfare. \* \* \*

We are not now required to ascertain the scope of the phrase "general welfare of the United States" or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.

From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.

It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted. \* \* \*

In the Child Labor Tax Case, 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817, 21 A.L.R. 1432, and in Hill v. Wallace, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822, this court had before it statutes which purported to be taxing measures. But their purpose was found to be to regulate the conduct of manufacturing and trading, not in interstate commerce, but in the states—matters not within any power conferred upon Congress by the Constitution—and the levy of the tax a means to force compliance. The court held

this was not a constitutional use, but an unconstitutional abuse of the power to tax. In *Linder v. United States*, supra, we held that the power to tax could not justify the regulation of the practice of a profession, under the pretext of raising revenue. In *United States v. Constantine*, 296 U.S. 287, 56 S.Ct. 223, 80 L.Ed. 233, we declared that Congress could not, in the guise of a tax, impose sanctions for violation of state law respecting the local sale of liquor. These decisions demonstrate that Congress could not, under the pretext of raising revenue, lay a tax on processors who refuse to pay a certain price for cotton and exempt those who agree so to do, with the purpose of benefiting producers.

Third. If the taxing power may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, as in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command? The government asserts that whatever might be said against the validity of the plan, if compulsory, it is constitutionally sound because the end is accomplished by voluntary co-operation. There are two sufficient answers to the contention. The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful. It is pointed out that, because there still remained a minority whom the rental and benefit payments were insufficient to induce to surrender their independence of action, the Congress has gone further, and, in the Bankhead Cotton Act, used the taxing power in a more directly minatory fashion to compel submission. This progression only serves more fully to expose the coercive purpose of the so-called tax imposed by the present act. It is clear that the Department of Agriculture has properly described the plan as one to keep a nonco-operating minority in line. This is coercion by economic pressure. The asserted power of choice is illusory. \* \* \*

But if the plan were one for purely voluntary co-operation it would stand no better so far as federal power is concerned. At best, it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states.

It is said that Congress has the undoubted right to appropriate money to executive officers for expenditure under contracts between the government and individuals; that much of the total expenditures is so made. But appropriations and expenditures under contracts for proper governmental purposes cannot justify contracts which are not within federal power. And contracts for the reduction of acreage and the control of production are outside the range of that power. An appropriation to be expended by the United States under contracts calling for violation of a state law clearly would offend the Constitution. Is a statute less objectionable which authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle? The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action. \* \* \*

We are not here concerned with a conditional appropriation of money, nor with a provision that if certain conditions are not complied with the appropriation shall no longer be available. By the Agricultural Adjustment Act the amount of the tax is appropriated to be expended only in payment under contracts whereby the parties bind themselves to regulation by the federal government. There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced. Many examples pointing the distinction might be cited. We are referred to appropriations in aid of education, and it is said that no one has doubted the power of Congress to stipulate the sort of education for which money shall be expended. But an appropriation to an educational institution which by its terms is to become available only if the beneficiary enters into a contract to teach doctrines subversive of the Constitution is clearly bad. An affirmance of the authority of Congress so to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power.

But it is said that there is a wide difference in another respect, between compulsory regulation of the local affairs of a state's citizens and the mere making of a contract relating to their conduct; that, if any state objects, it may declare the contract void and thus prevent those under the state's jurisdiction from complying with its terms. The argument is plainly fallacious. The United States can make the contract only if the federal power to tax and to appropriate reaches the subject-matter of the contract. If this does reach the subject-matter, its exertion cannot be dis-

placed by state action. To say otherwise is to deny the supremacy of the laws of the United States; to make them subordinate to those of a state. This would reverse the cardinal principle embodied in the Constitution and substitute one which declares that Congress may only effectively legislate as to matters within federal competence when the states do not dissent.

Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance. The Constitution and the entire plan of our government negative any such use of the power to tax and to spend as the act undertakes to authorize. It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states. If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of section 8 of article 1 would become the instrument for total subversion of the governmental powers reserved to the individual states.

If the act before us is a proper exercise of the federal taxing power, evidently the regulation of all industry throughout the United States may be accomplished by similar exercises of the same power. It would be possible to exact money from one branch of an industry and pay it to another branch in every field of activity which lies within the province of the states. The mere threat of such a procedure might well induce the surrender of rights and the compliance with federal regulation as the price of continuance in business. A few instances will illustrate the thought. \* \* \*

Until recently no suggestion of the existence of any such power in the federal government has been advanced. The expressions of the framers of the Constitution, the decisions of this court interpreting that instrument and the writings of great commentators will be searched in vain for any suggestion that there exists in the clause under discussion or elsewhere in the Constitution, the authority whereby every provision and every fair implication from that instrument may be subverted, the independence of the individual states obliterated, and the United States converted into a central government exercising uncontrolled police power in every state of the Union superseding all local control or regulation of the affairs or concerns of the states.

Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States (which has aptly been termed "an indestructible Union, composed of indestructible States,") might be served by obliterating the constituent members of the Union. But to this fatal conclusion the doctrine contended for would inevitably lead. And its sole premise is that, though the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its powers, so as to reserve to the states and the people sovereign power, to be wielded by the states and their citizens and not to be invaded by the United States, they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed. The argument, when seen in its true character and in the light of its inevitable results, must be rejected.

Since, as we have pointed out, there was no power in the Congress to impose the contested exaction, it could not lawfully ratify or confirm what an executive officer had done in that regard. Consequently the Act of 1935, § 30, adding section 21(b) to Act of May 12, 1933 (7 U.S.C.A. § 623(b), does not affect the rights of the parties.

The judgment is affirmed.

Mr. Justice STONE dissented in an opinion concurred in by Messrs. Justices BRANDEIS and CARDOZO.

#### NOTE

1. For discussion of what constitutes taxing for the general welfare, see *Helvering v. Davis*, 301 U.S. 619, 57 S.Ct. 904, 81 L. Ed. 1307 (1937); and *C. C. Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937).

2. That Congress may condition its grants-in-aid to the state upon compliance with Congressional acts limiting the political activities of state officials connected with the expenditure of such federal funds, see *Oklahoma v. U. S. Civil Service Commission*, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947).

3. See on the general subject of federal taxing and spending powers, E. S. Corwin, *The Spending Power of Congress*, 36 Harv. L.Rev. 548 (1923); E. M. Perkins, *The Power of Congress to Levy Taxes for Distribution to the States*, 12 North Car.L.Rev. 326 (1934); E. S. Corwin, *Constitutional Aspects of Federal Housing*,

84 U.Pa.L.Rev. 131 (1935); C. Perry Patterson, The General Welfare Clause, 30 Minn.L.Rev. 43 (1945); G. Merle Bergman, The Federal Power to Tax and to Spend, 31 Minn.L.Rev. 328 (1947).

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### CINCINNATI SOAP CO. v. UNITED STATES.

Supreme Court of the United States, 1937. 301 U.S. 308, 57 S.Ct. 764, 81 L.Ed. 1122.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

Section 602½ of the Revenue Act of 1934, c. 277, 48 Stat. 680, 763, 26 U.S.C.A. § 999, imposes a tax of 3 cents per pound upon the first domestic processing of coconut oil, and provides that all such taxes collected with respect to coconut oil wholly of Philippine production, etc., "shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but if at any time the Philippine Government provides by any law for any subsidy to be paid to the producers of copra, coconut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection."

Both petitioners are engaged in manufacturing soap and, at times stated in their petitions, used in its manufacture large quantities of coconut oil wholly the product of the Philippine Islands. In pursuance of section 602½, they made returns and paid the amount of the tax as required by that section. Subsequently, each of them filed with the Bureau of Internal Revenue a claim for the refund of the tax, on the ground that the imposition was not within the constitutional power of Congress. Both claims were denied, and petitions at law were filed in federal district courts to recover the sums paid. Demurrers were interposed attacking the sufficiency of the petitions, and these demurrers were sustained by the trial courts. Appeals were taken to the respective circuit courts of appeal named in the title; and we granted writs of certiorari before a hearing or submission in those courts, because of the importance to the Philippine Islands of an early final decision of the question. *Cincinnati Soap Co. v. United States*, 300 U.S. 649, 57 S.Ct. 493, 81 L.Ed. 861; *Haskins Bros. & Co. v. O'Malley*, 300 U.S. 649, 57 S.Ct. 494, 81 L.Ed. 861.

The validity of the tax is assailed by petitioners upon a variety of grounds, developed at length in their respective briefs and by the oral arguments at the bar. So far as we find it necessary to consider the various contentions, they may be stated in general terms as follows: That the tax is not imposed for any purpose contemplated by the taxing clause of section 8, art. 1, of the

Federal Constitution U.S.C.A.Const. art. 1, § 8—that is to say, it is not imposed to pay the debts or provide for the common defense or general welfare of the United States; that, on the contrary, it is imposed for a purely local purpose, in violation of the Tenth Amendment, U.S.C.A.Const. amend. 10; that the exaction violates the due process clause of the Fifth Amendment, U.S.C.A. Const. amend. 5, because it is an arbitrary exaction from one group of persons for the exclusive benefit of another; that the act does not impose a true tax, but is a regulatory measure outside the field of federal power; that it violates clause 7, § 9, of art. 1 of the Constitution, U.S.C.A.Const. art. 1, § 9, cl. 7, which provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”; that the payment in bulk of the entire proceeds of the tax to the Philippines, with no direction as to the expenditure thereof, constitutes an unlawful delegation of legislative power. In dealing with these contentions, we find it convenient to do so without following the precise order in which they have just been stated. And certain of them are so interrelated that they may be joined for consideration in the same subdivision of the opinion which follows.

First. Plainly, the imposition of the tax in itself is a valid exercise of the taxing power of the federal government. It is purely an excise tax upon a manufacturing process for revenue purposes, and in no sense a regulation of the process itself. The Tenth Amendment is without application, since the powers of the several states over local affairs are not invaded or involved. This is disclosed upon the face of the act so clearly that discussion could not make it plainer. *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914, relied upon by petitioner, is not in point. There, we held that the sole aim of the statute, as shown by its terms, was to regulate a local situation, a matter wholly within the reserved powers of the states; and moreover that it amounted to a naked taking of the property of one group of persons for bestowal upon another group. The *Child Labor Tax Case*, 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817, 21 A.L.R. 1432, and other cases cited, bear still more remotely upon the contention. It is enough to say that the feature of the present case which differentiates it from all those cited is that the exaction here, both in form and substance, is a true tax, imposed, as we presently shall show, for a federal constitutional purpose. In that view the due process clause of the Fifth Amendment is not involved.

Second. Standing apart, therefore, the tax is unassailable. It is said to be bad because it is earmarked and devoted from its inception to a specific purpose. But if the tax, qua tax, be good, as we hold it is, and the purpose specified be one which would

sustain a subsequent and separate appropriation made out of the general funds of the Treasury, neither is made invalid by being bound to the other in the same act of legislation. The only concern which we have in that aspect of the matter is to determine whether the purpose specified is one for which Congress can make an appropriation without violating the fundamental law. If Congress, for reasons deemed by it to be satisfactory, chose to adopt the quantum of receipts from this particular tax as the measure of the appropriation, we perceive no valid basis for challenging its power to do so.

We inquire first: Is the proposed *appropriation* to the Philippine Treasury for a constitutional purpose? since an affirmative answer to that question will establish the constitutional purpose of the tax. The pertinent taxing clause provides in general terms (article 1, § 8, cl. 1) that taxes may be laid "to pay the Debts and provide for the common Defence and general Welfare of the United States." Primarily, and in a very high degree, whether a tax serves any of these purposes is a practical question addressed to the lawmaking department. And it will require a very plain case to warrant the courts in setting aside the conclusion of Congress in that regard. Compare *Nicol v. Ames*, 173 U.S. 509, 514-516, 19 S.Ct. 522, 43 L.Ed. 786. Nevertheless, such plain cases may exist; and the question is whether this is one of them.

The Philippine Islands and their inhabitants, from the beginning of our occupation, have borne a peculiar relation to the United States. The Islands constitute a dependency over which the United States, for more than a generation, has had and exercised supreme power of legislation and administration, *Posadas v. National City Bank*, 296 U.S. 497, 502, 56 S.Ct. 349, 351, 80 L.Ed. 351, a power limited only by the terms of the treaty of cession and those principles of the Constitution which by their nature are inherently inviolable. The possession of this well-nigh absolute power over a dependent people carries with it great obligations, as was pointed out by Mr. Root as Secretary of War in 1899. After referring to the practically unlimited power which we had over the Philippines, he said: "I assume, also, that the obligations correlative to this great power are of the highest character, and that it is our unquestioned duty to make the interests of the people over whom we assert sovereignty the first and controlling consideration in all legislation and administration which concerns them, and to give them, to the greatest possible extent, individual freedom, self-government in accordance with their capacity, just and equal laws, and opportunity for education, for profitable industry, and for development in civilization." *Military and Colonial Policy of the United States*, 161, 162.

Among these correlative duties is the moral obligation to protect, defend, and provide for the general welfare of, the inhabitants. And such an obligation well may require the appropriation and expenditure of money from the national purse—in which case the obligation fairly comes within the term “debts” as used in the taxing clause. *United States v. Realty Co.*, 163 U.S. 427, 440, 441, 16 S.Ct. 1120, 1125, 41 L.Ed. 215. Congress, from the beginning of its existence, has accepted and legislated upon that view of the broad meaning of the term. In innumerable instances, it has made appropriations to relieve needs caused by earthquakes, fire, and other events, not only in localities within or possessed by the United States, but in foreign countries as well. Government counsel has furnished us an impressive list of appropriations of this character; and in addition has called attention to the many instances of appropriations for the support and welfare of the Indians, and for the uses of the territories. Legislation of this character has been so long continued and its validity so long unquestioned that, as we said in *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 322, 327, 328, 57 S.Ct. 216, 224, 81 L.Ed. 255: “A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined.”

It may be that the tax and the appropriation of the proceeds therefrom in the present instance could be justified as an exercise of the taxing power to provide, in a broad sense, for the public defense or the general welfare of the United States. We do not pause to consider that view; for plainly, we think, the law may be sustained as an act in discharge of a high moral obligation, amounting to a “debt” within the meaning of the Constitution as it always has been practically construed. The justification for that conclusion has been so fully stated by this court in the case of *United States v. Realty Co.*, supra, that further citation becomes unnecessary. “Under the provisions of the Constitution (article 1, § 8),” we there said, “Congress has power to lay and collect taxes, etc., ‘to pay the debts’ of the United States. Having power to raise money for that purpose, it of course follows that it has power, when the money is raised, to appropriate it to the same object. What are the debts of the United States within the meaning of this constitutional provision? It is conceded, and, indeed, it cannot be questioned, that the debts are not limited to those which are evidenced by some written obligation, or to those which are otherwise of a strictly

legal character. The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice,—when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of congress extends, at least, as far as the recognition and payment of claims against the government which are thus founded. To no other branch of the government than congress could any application be successfully made, on the part of the owners of such claims or debts, for the payment thereof. Their recognition depends solely upon congress, and whether it will recognize claims thus founded must be left to the discretion of that body. Payments to individuals, not of right, or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government, by virtue of acts of congress appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity. A long list of acts directing payments of the above general character is appended to the brief of one of the counsel for the defendants in error. The acts are referred to, not for the purpose of asserting their validity in all cases, but as evidence of what has been the practice of congress since the adoption of the constitution. See, also, among other cases in this court, *Emerson v. Hall*, 13 Pet. 409, 10 L.Ed. 223; *United States v. Price*, 116 U.S. 43, 6 S.Ct. 235, 29 L.Ed. 541; *Williams v. Heard*, 140 U.S. 529, 11 S.Ct. 885, 35 L.Ed. 550. The last-cited case arose under an act of congress in relation to the Alabama claims."

Later decisions of this court have followed that view. *United States v. Cook*, 257 U.S. 525, 42 S.Ct. 200, 66 L.Ed. 350; *Marion & R. V. Ry. Co. v. United States*, 270 U.S. 280, 284, 46 S.Ct. 253, 255, 70 L.Ed. 585. The determination of Congress to recognize the moral obligation of the nation to make an appropriation as a requirement of justice and honor, is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find. *United States v. Realty Co.*, supra, 163 U.S. 427, at page 444, 16 S.Ct. 1120, 41 L.Ed. 215.

It does not follow that because a federal tax levied for the express purpose of paying the debts or providing for the welfare of a state might be invalid (*Passenger Cases*, *Smith v. Turner*, 7 How. 283, 446, 12 L.Ed. 702) that such a tax for the uses of a territory or dependency would likewise be invalid. A state, ex-

cept as the federal Constitution otherwise requires, is supreme and independent. It has its own government, with full powers of taxation and full power to appropriate the revenues derived therefrom. A dependency has no government but that of the United States, except in so far as the United States may permit. The national government may do for one of its dependencies whatever a state might do for itself or one of its political subdivisions, since over such a dependency the nation possesses the sovereign powers of the general government plus the powers of a local or a state government in all cases where legislation is possible. Compare *Stoutenburgh v. Hennick*, 129 U.S. 141, 147, 9 S.Ct. 256, 32 L.Ed. 637; *National Bank v. County of Yankton*, 101 U.S. 129, 133, 25 L.Ed. 1046; *Late Corporation of the Church of Jesus Christ, etc., v. United States*, 136 U.S. 1, 42, 10 S.Ct. 792, 34 L.Ed. 481; *Utter v. Franklin*, 172 U.S. 416, 423, 19 S.Ct. 183, 43 L.Ed. 498. To say that the federal government, with such practically unlimited powers of legislation in respect of a dependency, is yet powerless to appropriate money for its needs, is to deny—what the foregoing considerations forbid us to deny—that the United States has, in that regard, the equivalent power of a state in comparable circumstances. \* \* \*

It is not improbable that a failure to exercise control over imports from the Philippines would injuriously affect the industries of this country; and, on the other hand, an exercise of the power to tax imports might prove injurious to the people of the islands. Congress, in passing the legislation here under consideration, is not forbidden to balance these respective probabilities. The tax itself, it is said, was imposed for the purpose of protecting certain industries in this country; and it is challenged on that ground. That Congress has power to levy a tax with the collateral purpose of thereby protecting the industries of the United States is no longer open to doubt. *Hampton & Co. v. United States*, 276 U.S. 394, 411, 48 S.Ct. 348, 352, 72 L.Ed. 624. But, in exercising the power here with that purpose, Congress may have concluded that it would thereby impose a hardship upon the Philippines which it was the moral duty of Congress to redress so far as possible. In that situation, we see no constitutional objection to a discharge of the duty by the appropriation of an amount equivalent to the tax in order to offset the anticipated burden. Certainly, this court cannot judicially declare that justice and fair dealing in respect of a people, not yet completely independent of our authority, does not warrant such action.

Nor do we see any objection to the plan because the payment of the funds is subject to the condition that the Philippine Government shall not provide for any subsidy to be paid to the Phil-

ippine producers of coconut oil and the other products named in section 602 $\frac{1}{2}$  of the act.

It is perfectly plain that since Congress may levy the tax with the collateral purpose of protecting the industries of this country, it may in appropriating the proceeds put such restriction upon their use as will prevent the purpose from being nullified. This, we think, is the aim and the effect of the proviso. \* \* \*

Judgments affirmed.

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CHAS. C. STEWARD MACHINE CO. v. DAVIS.

Supreme Court of the United States, 1937. 301 U.S. 548, 57 S.Ct. 883,  
81 L.Ed. 1279, 109 A.L.R. 1293.

Suit by the Charles C. Steward Machine Company against Harwell G. Davis, individually and as Collector of Internal Revenue for the District of Alabama. A judgment dismissing the suit was affirmed by the Circuit Court of Appeals, 89 F.2d 207, and plaintiff brings certiorari.

Affirmed.

Mr. Justice CARDOZO delivered the opinion of the Court.

The validity of the tax imposed by the Social Security Act, 42 U.S.C.A. §§ 301-1305, on employers of eight or more is here to be determined.

Petitioner, an Alabama corporation, paid a tax in accordance with the statute, filed a claim for refund with the Commissioner of Internal Revenue, and sued to recover the payment (\$46.14), asserting a conflict between the statute and the Constitution of the United States. Upon demurrer the District Court gave judgment for the defendant dismissing the complaint, and the Circuit Court of Appeals for the Fifth Circuit affirmed. 89 F. 2d 207. The decision is in accord with judgments of the Supreme Judicial Court of Massachusetts, *Howes Brothers Co. v. Massachusetts Unemployment Compensation Commission*, December 30, 1936, 5 N.E.2d 720, the Supreme Court of California, *Gillum v. Johnson*, November 25, 1936, 62 P.2d 1037, and the Supreme Court of Alabama, *Beeland Wholesale Co. v. Kaufman*, March 18, 1937, 174 So. 516. It is in conflict with a judgment of the Circuit Court of Appeals for the First Circuit, from which one judge dissented. *Davis v. Boston & Maine R. R. Co.*, April 14, 1937, 89 F.2d 368. An important question of constitutional law being involved, we granted certiorari. 300 U.S. 652, 57 S.Ct. 673, 81 L.Ed. 863.

The Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U.S.C., c. 7 (Supp. II), 42 U.S.C.A. §§ 301-1305) is divided into eleven separate titles, of which only titles IX and III are so related to this case as to stand in need of summary.

The caption of title IX is "Tax on Employers of Eight or More." Every employer (with stated exceptions) is to pay for each calendar year "an excise tax, with respect to having individuals in his employ," the tax to be measured by prescribed percentages of the total wages payable by the employer during the calendar year with respect to such employment. Section 901, 42 U.S.C.A. § 1101. One is not, however, an "employer" within the meaning of the act unless he employs eight persons or more. Section 907(a), 42 U.S.C.A. § 1107(a). There are also other limitations of minor importance. The term "employment" too has its special definition, excluding agricultural labor, domestic service in a private home, and some other smaller classes. Section 907(c), 42 U.S.C.A. § 1107(c). The tax begins with the year 1936, and is payable for the first time on January 31, 1937. During the calendar year 1936 the rate is to be 1 per cent., during 1937 2 per cent., and 3 per cent. thereafter. The proceeds, when collected, go into the Treasury of the United States like internal revenue collections generally. Section 905(a), 42 U.S.C.A. § 1105(a). They are not earmarked in any way. In certain circumstances, however, credits are allowable. Section 902, 42 U.S.C.A. § 1102. If the taxpayer has made contributions to an unemployment fund under a state law, he may credit such contributions against the federal tax, provided, however, that the total credit allowed to any taxpayer shall not exceed 90 per centum of the tax against which it is credited, and provided also that the state law shall have been certified to the Secretary of the Treasury by the Social Security Board as satisfying certain minimum criteria. Section 902. The provisions of section 903, 42 U.S.C.A. § 1103, defining those criteria are stated in the margin. Some of the conditions thus attached to the allowance of a credit are designed to give assurance that the state unemployment compensation law shall be one in substance as well as name. Others are designed to give assurance that the contributions shall be protected against loss after payment to the state. To this last end there are provisions that before a state law shall have the approval of the Board it must direct that the contributions to the state fund be paid over immediately to the Secretary of the Treasury to the credit of the "Unemployment Trust Fund." Section 904, 42 U.S.C.A. § 1104, establishing this fund is quoted below. For the moment it is enough to say that the fund is to be held by the Secretary of the Treasury, who is to invest in government securities any portion not required in his judgment to meet current withdrawals. He is authorized and directed to pay out of the fund to any competent state agency such sums as it may

duly requisition from the amount standing to its credit. Section 904(f), 42 U.S.C.A. § 1104(f).

Title III, which is also challenged as invalid, has the caption "Grants to States for Unemployment Compensation Administration." Under this title, certain sums of money are "authorized to be appropriated" for the purpose of assisting the states in the administration of their unemployment compensation laws, the maximum for the fiscal year ending June 30, 1936, to be \$4,000,000, and \$49,000,000 for each fiscal year thereafter. Section 301, 42 U.S.C.A. § 501. No present appropriation is made to the extent of a single dollar. All that the title does is to authorize future appropriations. Actually only \$2,250,000 of the \$4,000,000 authorized was appropriated for 1936 (Act of Feb. 11, 1936, c. 49, 49 Stat. 1109, 1113) and only \$29,000,000 of the \$49,000,000 authorized for the following year (Act of June 22, 1936, c. 689, 49 Stat. 1597, 1605). The appropriations when made were not specifically out of the proceeds of the employment tax, but out of any moneys in the Treasury. Other sections of the title prescribe the method by which the payments are to be made to the state (section 302, 42 U.S.C.A. § 502) and also certain conditions to be established to the satisfaction of the Social Security Board before certifying the propriety of a payment to the Secretary of the Treasury (section 303, 42 U.S.C.A. § 503). They are designed to give assurance to the federal government that the moneys granted by it will not be expended for purposes alien to the grant, and will be used in the administration of genuine unemployment compensation laws.

The assault on the statute proceeds on an extended front. Its assailants take the ground that the tax is not an excise; that it is not uniform throughout the United States as excises are required to be; that its exceptions are so many and arbitrary as to violate the Fifth Amendment, U.S.C.A. Const. Amend. 5; that its purpose was not revenue, but an unlawful invasion of the reserved powers of the states; and that the states in submitting to it have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender.

The objections will be considered seriatim with such further explanation as may be necessary to make their meaning clear.

First: The tax, which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost, or an excise upon the relation of employment.

1. We are told that the relation of employment is one so essential to the pursuit of happiness that it may not be burdened with a tax. Appeal is made to history. From the pre-

cedents of colonial days, we are supplied with illustrations of excises common in the colonies. They are said to have been bound up with the enjoyment of particular commodities. Appeal is also made to principle or the analysis of concepts. An excise, we are told, imports a tax upon a privilege; employment, it is said, is a right, not a privilege, from which it follows that employment is not subject to an excise. Neither the one appeal nor the other leads to the desired goal.

As to the argument from history: Doubtless there were many excises in colonial days and later that were associated, more or less intimately, with the enjoyment or the use of property. This would not prove, even if no others were then known, that the forms then accepted were not subject to enlargement. Cf. *Pensacola Teleg. Co. v. Western Union Telegraph Co.*, 96 U.S. 1, 9, 24 L.Ed. 708; *In re Debs*, 158 U.S. 564, 591, 15 S.Ct. 900, 39 L.Ed. 1092; *South Carolina v. United States*, 199 U.S. 437, 448, 449, 26 S.Ct. 110, 50 L.Ed. 261, 4 Ann.Cas. 737. But in truth other excises were known, and known since early times. Thus in 1695 (6 & 7 Wm. III, c. 6), Parliament passed an act which granted "to His Majesty certain Rates and Duties upon Marriages, Births and Burials," all for the purpose of "carrying on the War against France with Vigour." See *Opinion of the Justices*, 196 Mass. 603, 609, 85 N.E. 545, 547. No commodity was affected there. The industry of counsel has supplied us with an apter illustration where the tax was not different in substance from the one now challenged as invalid. In 1777, before our Constitutional Convention, Parliament laid upon employers an annual "duty" of 21 shillings for "every male Servant" employed in stated forms of work. Revenue Act of 1777, 17 George III, c. 39. The point is made as a distinction that a tax upon the use of male servants was thought of as a tax upon a luxury. *Davis v. Boston & Maine R. R. Co.*, supra. It did not touch employments in husbandry or business. This is to throw over the argument that historically an excise is a tax upon the enjoyment of commodities. But the attempted distinction, whatever may be thought of its validity, is inapplicable to a statute of Virginia passed in 1780. There a tax of 3 pounds, 6 shillings, and 8 pence was to be paid for every male tithable above the age of twenty-one years (with stated exceptions), and a like tax for "every white servant whatsoever, except apprentices under the age of twenty one years." 10 Hening's Statutes of Virginia, p. 244. Our colonial forbears knew more about ways of taxing than some of their descendants seem to be willing to concede.

The historical prop failing, the prop or fancied prop of principle remains. We learn that employment for lawful gain is

a "natural" or "inherent" or "inalienable" right, and not a "privilege" at all. But natural rights, so called, are as much subject to taxation as rights of less importance. An excise is not limited to vocations or activities that may be prohibited altogether. It is not limited to those that are the outcome of a franchise. It extends to vocations or activities pursued as of common right. What the individual does in the operation of a business is amenable to taxation just as much as what he owns, at all events if the classification is not tyrannical or arbitrary. "Business is as legitimate an object of the taxing power as property." *City of Newton v. Atchison*, 31 Kan. 151, 154, 1 P. 288, 290, 47 Am.Rep. 486 (per Brewer, J.). Indeed, ownership itself, as we had occasion to point out the other day, is only a bundle of rights and privileges invested with a single name. *Henneford v. Silas Mason Co., Inc.* (March 29, 1937) 300 U.S. 577, 57 S.Ct. 524, 527, 81 L.Ed. 814. "A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively." *Id.* Employment is a business relation, if not itself a business. It is a relation without which business could seldom be carried on effectively. The power to tax the activities and relations that constitute a calling considered as a unit is the power to tax any of them. The whole includes the parts. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 267, 268, 53 S.Ct. 345, 349, 350, 77 L. Ed. 730, 87 A.L.R. 1191.

The subject-matter of taxation open to the power of the Congress is as comprehensive as that open to the power of the states, though the method of apportionment may at times be different. "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises." Article 1, § 8, U.S.C.A. Const. art. 1, § 8. If the tax is a direct one, it shall be apportioned according to the census or enumeration. If it is a duty, impost, or excise, it shall be uniform throughout the United States. Together, these classes include every form of tax appropriate to sovereignty. Cf. *Burnet v. Brooks*, 288 U.S. 378, 403, 405, 53 S.Ct. 457, 464, 465, 77 L.Ed. 844, 86 A.L.R. 747; *Brushaber v. Union Pacific R. R. Co.*, 240 U.S. 1, 12, 36 S.Ct. 236, 60 L.Ed. 493, L.R.A.1917D, 414, Ann.Cas.1917B, 713. Whether the tax is to be classified as an "excise" is in truth not of critical importance. If not that, it is an "impost" (*Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 622, 625, 15 S.Ct. 912, 39 L.Ed. 1108; *Pacific Insurance Co. v. Soule*, 7 Wall. 433, 445, 19 L.Ed. 95), or a "duty" (*Veazie Bank v. Fenno*, 8 Wall. 533, 546, 547, 19 L.Ed. 482; *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 570, 15 S.Ct. 673, 39 L.Ed. 759; *Knowlton v. Moore*, 178 U.S. 41, 46, 20 S.Ct. 747, 44 L.Ed. 969). A capitation or

other "direct" tax it certainly is not. "Although there have been, from time to time, intimations that there might be some tax which was not a direct tax, nor included under the words 'duties, imposts, and excises,' such a tax, for more than 100 years of national existence, has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue." *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 557, 15 S.Ct. 673, 680, 39 L.Ed. 759. There is no departure from that thought in later cases, but rather a new emphasis of it. Thus, in *Thomas v. United States*, 192 U.S. 363, 370, 24 S.Ct. 305, 306, 48 L.Ed. 481, it was said of the words "duties, imposts, and excises" that "they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like." At times taxpayers have contended that the Congress is without power to lay an excise on the enjoyment of a privilege created by state law. The contention has been put aside as baseless. Congress may tax the transmission of property by inheritance or will, though the states and not Congress have created the privilege of succession. *Knowlton v. Moore*, supra, 178 U.S. 41, at page 58, 20 S.Ct. 747, 44 L.Ed. 969. Congress may tax the enjoyment of a corporate franchise, though a state and not Congress has brought the franchise into being. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 108, 155, 31 S.Ct. 342, 55 L.Ed. 389, Ann.Cas.1912B, 1312. The statute books of the states are strewn with illustrations of taxes laid on occupations pursued of common right. We find no basis for a holding that the power in that regard which belongs by accepted practice to the Legislatures of the states, has been denied by the Constitution to the Congress of the nation.

2. The tax being an excise, its imposition must conform to the canon of uniformity. There has been no departure from this requirement. According to the settled doctrine, the uniformity exacted is geographical, not intrinsic. *Knowlton v. Moore*, supra, 178 U.S. 41, at page 83, 20 S.Ct. 747, 44 L.Ed. 969; *Flint v. Stone Tracy Co.*, supra, 220 U.S. 107, at page 158, 31 S.Ct. 342, 55 L.Ed. 389, Ann.Cas.1912B, 1312; *Billings v. United States*, 232 U.S. 261, 282, 34 S.Ct. 421, 58 L.Ed. 596; *Stellwagen v. Clum*, 245 U.S. 605, 613, 38 S.Ct. 215, 62 L.Ed. 507; *LaBelle Iron Works v. United States*, 256 U.S. 377, 392, 41 S.Ct. 528, 532, 65 L.Ed. 998; *Poe v. Seaborn*, 282 U.S. 101, 117, 51 S.Ct. 58, 61, 75 L.Ed. 239; *Wright v. Vinton Branch of Mountain Trust Bank* (March 29, 1937) 300 U.S. 440, 57 S.Ct. 556, 81 L.Ed. 736. "The rule of liability shall be alike in all parts of the

United States." *Florida v. Mellon*, 273 U.S. 12, 17, 47 S.Ct. 265, 266, 71 L.Ed. 511.

Second: The excise is not invalid under the provisions of the Fifth Amendment by force of its exemptions.

The statute does not apply, as we have seen, to employers of less than eight. It does not apply to agricultural labor, or domestic service in a private home or to some other classes of less importance. Petitioner contends that the effect of these restrictions is an arbitrary discrimination vitiating the tax.

The Fifth Amendment unlike the Fourteenth, U.S.C.A.Const. Amends. 5, 14, has no equal protection clause. *LaBelle Iron Works v. United States*, *supra*; *Brushaber v. Union Pacific R. Co.*, *supra*, 240 U.S. 1, at page 24, 36 S.Ct. 236, 60 L.Ed. 493, L.R.A.1917D, 414, Ann.Cas.1917B, 713. But even the states, though subject to such a clause, are not confined to a formula of rigid uniformity in framing measures of taxation. *Swiss Oil Corporation v. Shanks*, 273 U.S. 407, 413, 47 S.Ct. 393, 395, 71 L.Ed. 709. They may tax some kinds of property at one rate, and others at another, and exempt others altogether. *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U.S. 232, 10 S.Ct. 533, 33 L.Ed. 892; *Stebbins v. Riley*, 268 U.S. 137, 142, 45 S.Ct. 424, 426, 69 L.Ed. 884, 44 A.L.R. 1454; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 150, 50 S.Ct. 310, 74 L.Ed. 775. They may lay an excise on the operations of a particular kind of business, and exempt some other kind of business closely akin thereto. *Quong Wing v. Kirkendall*, 223 U.S. 59, 62, 32 S.Ct. 192, 56 L.Ed. 350; *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89, 94, 21 S.Ct. 43, 45 L.Ed. 102; *Armour Packing Co. v. Lacy*, 200 U.S. 226, 235, 26 S.Ct. 232, 50 L.Ed. 451; *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573, 30 S.Ct. 578, 54 L.Ed. 883; *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 255, 43 S.Ct. 83, 84, 67 L.Ed. 237; *State Board of Tax Com'rs v. Jackson*, 283 U.S. 527, 537, 538, 51 S.Ct. 540, 543, 75 L.Ed. 1248, 73 A.L.R. 1464, 75 A.L.R. 1536. If this latitude of judgment is lawful for the states, it is lawful, a fortiori, in legislation by the Congress, which is subject to restraints less narrow and confining. *Quong Wing v. Kirkendall*, *supra*.

The classifications and exemptions directed by the statute now in controversy have support in considerations of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. This is held in two cases passed upon today in which precisely the same provisions were the subject of attack, the provisions being contained in the Unemployment Compensation Law of the state of Alabama (Gen.

Acts Ala.1935, p. 950, as amended). *Carmichael v. Southern Coal & Coke Co.*, *Carmichael v. Gulf States Paper Corporation*, 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327. The opinion rendered in those cases covers the ground fully. It would be useless to repeat the argument. The act of Congress is therefore valid, so far at least as its system of exemptions is concerned, and this though we assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment. \* \* \*

The judgment is affirmed.

[Mr. Justice BUTLER dissented, and several of the Justices rendered separate opinions.]

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### BRUSHABER v. UNION PACIFIC R. CO.

Supreme Court of the United States, 1916. 240 U.S. 1, 36 S.Ct. 236,  
60 L.Ed. 493, L.R.A.1917D, 414, Ann.Cas.1917B, 713.

[Appeal from the District Court of the United States for the Southern District of New York. Appellant, being a stockholder of the Union Pacific Railroad Company, filed his bill for an injunction to restrain the corporation from complying with the provisions of the income tax law of October 3, 1913 (38 Stat. 166), on the ground of its unconstitutionality, and appeals from a decree dismissing the bill. Affirmed.]

Mr. Chief Justice WHITE. \* \* \* Aside from averments as to citizenship and residence, recitals as to the provisions of the statute, and statements as to the business of the corporation, contained in the first ten paragraphs of the bill, advanced to sustain jurisdiction, the bill alleged twenty-one constitutional objections specified in that number of paragraphs or subdivisions. As all the grounds assert a violation of the Constitution, it follows that, in a wide sense, they all charge a repugnancy of the statute to the 16th Amendment, U.S.C.A.Const. amend. 16, under the more immediate sanction of which the statute was adopted.

The various propositions are so intermingled as to cause it to be difficult to classify them. We are of opinion, however, that the confusion is not inherent, but rather arises from the conclusion that the 16th Amendment provides for a hitherto unknown power of taxation; that is, a power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes. And the far-reaching effect of this erroneous assumption will be made clear by generalizing the many contentions advanced in argument to support it, as follows: (a) The Amendment authorizes only a particular character of direct tax without apportionment, and

therefore if a tax is levied under its assumed authority which does not partake of the characteristics exacted by the Amendment, it is outside of the Amendment, and is void as a direct tax in the general constitutional sense because not apportioned.

(b) As the Amendment authorizes a tax only upon incomes "from whatever source derived," the exclusion from taxation of some income of designated persons and classes is not authorized, and hence the constitutionality of the law must be tested by the general provisions of the Constitution as to taxation, and thus again the tax is void for want of apportionment. (c) As the right to tax "incomes from whatever source derived" for which the Amendment provides must be considered as exacting intrinsic uniformity, therefore no tax comes under the authority of the Amendment not conforming to such standard, and hence all the provisions of the assailed statute must once more be tested solely under the general and pre-existing provisions of the Constitution, causing the statute again to be void in the absence of apportionment. (d) As the power conferred by the Amendment is new and prospective, the attempt in the statute to make its provisions retroactively apply is void because, so far as the retroactive period is concerned, it is governed by the pre-existing constitutional requirement as to apportionment.

But it clearly results that the proposition and the contentions under it, if acceded to, would cause one provision of the Constitution to destroy another; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned. Moreover, the tax authorized by the Amendment, being direct, would not come under the rule of uniformity applicable under the Constitution to other than direct taxes, and thus it would come to pass that the result of the Amendment would be to authorize a particular direct tax not subject either to apportionment or to the rule of geographical uniformity, thus giving power to impose a different tax in one state or states than was levied in another state or states. This result, instead of simplifying the situation and making clear the limitations on the taxing power, which obviously the Amendment must have been intended to accomplish, would create radical and destructive changes in our constitutional system and multiply confusion. \* \* \*

Upon the lapsing of a considerable period after the repeal of the income tax laws referred to, in 1894 [28 Stat. 509, c. 349], an act was passed laying a tax on incomes from all classes of property and other sources of revenue which was not apportioned, and which therefore was of course assumed to come within the classification of excises, duties, and imposts which were subject

to the rule of uniformity, but not to the rule of apportionment. The constitutional validity of this law was challenged on the ground that it did not fall within the class of excises, duties, and imposts, but was direct in the constitutional sense, and was therefore void for want of apportionment, and that question came to this court and was passed upon in *Pollock v. Farmers' Loan & T. Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759; *Id.*, 158 U.S. 601, 15 S.Ct. 912, 39 L.Ed. 1108. The court, fully recognizing in the passage which we have previously quoted the all-embracing character of the two great classifications, including, on the one hand, direct taxes subject to apportionment, and on the other, excises, duties, and imposts subject to uniformity, held the law to be unconstitutional in substance for these reasons: Concluding that the classification of direct was adopted for the purpose of rendering it impossible to burden by taxation accumulations of property, real or personal, except subject to the regulation of apportionment, it was held that the duty existed to fix what was a direct tax in the constitutional sense so as to accomplish this purpose contemplated by the Constitution. 157 U.S. 581, 15 S.Ct. 689. Coming to consider the validity of the tax from this point of view, while not questioning at all that in common understanding it was direct merely on income and only indirect on property, it was held that, considering the substance of things, it was direct on property in a constitutional sense, since to burden an income by a tax was, from the point of substance, to burden the property from which the income was derived, and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent. As this conclusion but enforced a regulation as to the mode of exercising power under particular circumstances, it did not in any way dispute the all-embracing taxing authority possessed by Congress, including necessarily therein the power to impose income taxes if only they conformed to the constitutional regulations which were applicable to them. Moreover, in addition, the conclusion reached in the *Pollock Case* did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone, and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it. Nothing could serve to make this clearer than to recall that in the *Pollock Case*, in so far as the law taxed incomes from

other classes of property than real estate and invested personal property, that is, income from "professions, trades, employments, or vocations" (158 U.S. 637, 15 S.Ct. 620), its validity was recognized; indeed, it was expressly declared that no dispute was made upon that subject, and attention was called to the fact that taxes on such income had been sustained as excise taxes in the past. *Id.*, page 635, 15 S.Ct. 619. The whole law was, however, declared unconstitutional on the ground that to permit it to thus operate would relieve real estate and invested personal property from taxation and "would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain, in substance, a tax on occupations and labor" (*Id.*, page 637, 15 S.Ct. 620),—a result which, it was held, could not have been contemplated by Congress.

This is the text of the Amendment: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense,—an authority already possessed and never questioned,—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed, in the light of the history which we have given and of the decision in the *Pollock Case*, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock Case* was decided; that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment. From this in substance it indisputably arises, first, that all the contentions which we have previously noticed concerning the assumed limitations to be implied from the language of the Amendment as to the nature and character of the income taxes which it authorizes find no support in the text and are in irreconcilable conflict with the very purpose which the Amendment was adopted to accomplish. Second, that the contention that the Amendment treats a tax on income as a direct tax although it is

relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is also wholly without foundation since the command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived forbids the application to such taxes of the rule applied in the Pollock Case by which alone such taxes were removed from the great class of excises, duties, and imposts subject to the rule of uniformity, and were placed under the other or direct class. This must be unless it can be said that although the Constitution, as a result of the Amendment, in express terms excludes the criterion of source of income, that criterion yet remains for the purpose of destroying the classifications of the Constitution by taking an excise out of the class to which it belongs and transferring it to a class in which it cannot be placed consistently with the requirements of the Constitution. Indeed, from another point of view, the Amendment demonstrates that no such purpose was intended, and on the contrary shows that it was drawn with the object of maintaining the limitations of the Constitution and harmonizing their operation. We say this because it is to be observed that although from the date of the Hylton Case, 3 Dall. 171, 1 L.Ed. 556, because of statements made in the opinions in that case, it had come to be accepted that direct taxes in the constitutional sense were confined to taxes levied directly on real estate because of its ownership, the Amendment contains nothing repudiating or challenging the ruling in the Pollock Case that the word "direct" had a broader significance, since it embraced also taxes levied directly on personal property because of its ownership, and therefore the Amendment at least impliedly makes such wider significance a part of the Constitution,—a condition which clearly demonstrates that the purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended; that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself, and thereby to take an income tax out of the class of excises, duties, and imposts, and place it in the class of direct taxes.

We come, then, to ascertain the merits of the many contentions made in the light of the Constitution as it now stands; that is to say, including within its terms the provisions of the 16th Amendment as correctly interpreted. We first dispose of two propositions assailing the validity of the statute on the one hand because of its repugnancy to the Constitution in other respects,

and especially because its enactment was not authorized by the Sixteenth Amendment.

The statute was enacted October 3, 1913, and provided for a general yearly income tax from December to December of each year. Exceptionally, however, it fixed a first period embracing only the time from March 1, to December 31, 1913, and this limited retroactivity is assailed as repugnant to the due process clause of the 5th Amendment, and as inconsistent with the Sixteenth Amendment itself. U.S.C.A.Const. Amends. 5, 16. But the date of the retroactivity did not extend beyond the time when the Amendment was operative, and there can be no dispute that there was power by virtue of the Amendment during that period to levy the tax, without apportionment, and so far as the limitations of the Constitution in other respects are concerned, the contention is not open, since in *Stockdale v. Atlantic Ins. Co.*, 20 Wall. 323, 331, 22 L.Ed. 348, 351, in sustaining a provision in a prior income tax law which was assailed because of its retroactive character, it was said:

"The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4, 1864 [13 Stat. 417], imposed a tax of 5 per cent. upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it."

The statute provides that the tax should not apply to enumerated organizations or corporations, such as labor, agricultural or horticultural organizations, mutual savings banks, etc., and the argument is that as the Amendment authorized a tax on incomes "from whatever source derived," by implication it excluded the power to make these exemptions. But this is only a form of expressing the erroneous contention as to the meaning of the Amendment, which we have already disposed of. And so far as this alleged illegality is based on other provisions of the Constitution, the contention is also not open, since it was expressly considered and disposed of in *Flint v. Stone Tracy Co.*, 220 U.S. 108, 173, 31 S.Ct. 342, 55 L.Ed. 389, 422, Ann.Cas.1912B, 1312.

Without expressly stating all the other contentions, we summarize them to a degree adequate to enable us to typify and dispose of all of them.

1. The statute levies one tax called a normal tax on all incomes of individuals up to \$20,000, and from that amount up, by gradations, a progressively increasing tax, called an additional tax, is imposed. No tax, however, is levied upon incomes of

unmarried individuals amounting to \$3,000 or less, nor upon incomes of married persons amounting to \$4,000 or less. The progressive tax and the exempted amounts, it is said, are based on wealth alone, and the tax is therefore repugnant to the due process clause of the Fifth Amendment.

2. The act provides for collecting the tax at the source; that is, makes it the duty of corporations, etc., to retain and pay the sum of the tax on interest due on bonds and mortgages, unless the owner to whom the interest is payable gives a notice that he claims an exemption. This duty cast upon corporations, because of the cost to which they are subjected, is asserted to be repugnant to due process of law as a taking of their property without compensation, and we recapitulate various contentions as to discrimination against corporations and against individuals, predicated on provisions of the act dealing with the subject.

(a) Corporations indebted upon coupon and registered bonds are discriminated against, since corporations not so indebted are relieved of any labor or expense involved in deducting and paying the taxes of individuals on the income derived from bonds.

(b) Of the class of corporations indebted as above stated, the law further discriminates against those which have assumed the payment of taxes on their bonds, since although some or all of their bondholders may be exempt from taxation, the corporations have no means of ascertaining such fact, and it would therefore result that taxes would often be paid by such corporations when no taxes were owing by the individuals to the government.

(c) The law discriminates against owners of corporate bonds in favor of individuals none of whose income is derived from such property, since bondholders are, during the interval between the deducting and the paying of the tax on their bonds, deprived of the use of the money so withheld.

(d) Again, corporate bondholders are discriminated against because the law does not release them from payment of taxes on their bonds even after the taxes have been deducted by the corporation, and therefore if, after deduction, the corporation should fail, the bondholders would be compelled to pay the tax a second time.

(e) Owners of bonds the taxes on which have been assumed by the corporation are discriminated against because the payment of the taxes by the corporation does not relieve the bondholders of their duty to include the income from such bonds in making a return of all income, the result being a double payment of the taxes, labor and expense in applying for a refund, and a deprivation of the use of the sum of the taxes during the interval which elapses before they are refunded.

3. The provision limiting the amount of interest paid which may be deducted from gross income of corporations for the purpose of fixing the taxable income to interest on indebtedness not exceeding one half the sum of bonded indebtedness and paid-up capital stock is also charged to be wanting in due process because discriminating between different classes of corporations and individuals.

4. It is urged that want of due process results from the provision allowing individuals to deduct from their gross income dividends paid them by corporations whose incomes are taxed, and not giving such right of deduction to corporations.

5. Want of due process is also asserted to result from the fact that the act allows a deduction of \$3,000 or \$4,000 to those who pay the normal tax, that is, whose incomes are \$20,000 or less, and does not allow the deduction to those whose incomes are greater than \$20,000; that is, such persons are not allowed, for the purpose of the additional or progressive tax, a second right to deduct the \$3,000 or \$4,000 which they have already enjoyed. And a further violation of due process is based on the fact that for the purpose of the additional tax no second right to deduct dividends received from corporations is permitted.

6. In various forms of statement, want of due process, it is moreover insisted, arises from the provisions of the act allowing a deduction for the purpose of ascertaining the taxable income of stated amounts, on the ground that the provisions discriminate between married and single people, and discriminate between husbands and wives who are living together and those who are not.

7. Discrimination and want of due process result, it is said, from the fact that the owners of houses in which they live are not compelled to estimate the rental value in making up their incomes, while those who are living in rented houses and pay rent are not allowed, in making up their taxable income, to deduct rent which they have paid, and that want of due process also results from the fact that although family expenses are not, as a rule, permitted to be deducted from gross, to arrive at taxable, income, farmers are permitted to omit from their income return certain products of the farm which are susceptible of use by them for sustaining their families during the year.

So far as these numerous and minute, not to say in many respects hypercritical, contentions are based upon an assumed violation of the uniformity clause, their want of legal merit is at once apparent, since it is settled that that clause exacts only a geographical uniformity, and there is not a semblance of ground in any of the propositions for assuming that a violation of such uniformity is complained of. *Knowlton v. Moore*, 178 U.S. 41, 20

S.Ct. 747, 44 L.Ed. 969; *Patton v. Brady*, 184 U.S. 608, 622, 22 S.Ct. 493, 46 L.Ed. 713, 720; *Flint v. Stone Tracy Co.*, 220 U.S. 107, 158, 31 S.Ct. 342, 55 L.Ed. 389, 416, Ann.Cas.1912B, 1312; *Billings v. United States*, 232 U.S. 261, 282, 34 S.Ct. 421, 58 L.Ed. 596, 605.

So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause. *Treat v. White*, 181 U.S. 264, 21 S.Ct. 611, 45 L.Ed. 853; *Patton v. Brady*, 184 U.S. 608, 22 S.Ct. 493, 46 L.Ed. 713; *McCray v. United States*, 195 U.S. 27, 61, 24 S.Ct. 769, 49 L.Ed. 78, 97, 1 Ann.Cas. 561; *Flint v. Stone Tracy Co.*, 220 U.S. 107, 158, 31 S.Ct. 342, 55 L.Ed. 389, 416, Ann.Cas.1912B, 1312; *Billings v. United States*, 232 U.S. 261, 282, 34 S.Ct. 421, 58 L.Ed. 596, 605. And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the Fifth Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion. We say this because none of the propositions relied upon in the remotest degree present such questions. It is true that it is elaborately insisted that although there be no express constitutional provision prohibiting it, the progressive feature of the tax causes it to transcend the conception of all taxation and to be a mere arbitrary abuse of power which must be treated as wanting in due process. But the proposition disregards the fact that in the very early history of the government a progressive tax was imposed by Congress, and that such authority was exerted in some, if not all, of the various income taxes enacted prior to 1894 to which we have previously adverted. And over and above all this the contention but disregards the further fact that its absolute want of foundation in reason was plainly pointed out in *Knowlton v. Moore*, 178 U.S. 41, 20 S.Ct. 747, 44 L.Ed. 969, and the right to urge it was necessarily foreclosed by the ruling in that case made. In this situation it is, of course, superfluous to say that arguments as to the expediency of levying such taxes, or of the economic mistake or wrong involved in their imposition, are be-

yond judicial cognizance. Besides this demonstration of the want of merit in the contention based upon the progressive feature of the tax, the error in the others is equally well established either by prior decisions or by the adequate bases for classification which are apparent on the face of the assailed provisions; that is, the distinction between individuals and corporations, the difference between various kinds of corporations, etc., etc. *Ibid.*; *Flint v. Stone Tracy Co.*, 220 U.S. 107, 158, 31 S.Ct. 342, 55 L.Ed. 389, 416, Ann.Cas.1912B, 1312; *Billings v. United States*, 232 U.S. 261, 282, 34 S.Ct. 421, 58 L.Ed. 596, 605; *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L.Ed. 701; *National Safe Deposit Co. v. Stead*, 232 U.S. 58, 70, 34 S.Ct. 209, 58 L.Ed. 504, 510. In fact, comprehensively surveying all the contentions relied upon, aside from the erroneous construction of the Amendment which we have previously disposed of, we cannot escape the conclusion that they all rest upon the mistaken theory that although there be differences between the subjects taxed, to differently tax them transcends the limit of taxation and amounts to a want of due process, and that where a tax levied is believed by one who resists its enforcement to be wanting in wisdom and to operate injustice, from that fact in the nature of things there arises a want of due process of law and a resulting authority in the judiciary to exceed its powers and correct what is assumed to be mistaken or unwise exertions by the legislative authority of its lawful powers, even although there be no semblance of warrant in the Constitution for so doing. \* \* \*

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#### NOTE

1. The contention that particular federal taxes were direct, and invalid for want of the requisite apportionment, has seldom been sustained. The principal cases discussing the meaning of the language "direct taxes" are *Hylton v. U. S.*, 3 Dall. 171, 1 L.Ed. 556 (1796), and *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895), 158 U.S. 429, 15 S.Ct. 912, 39 L.Ed. 1108 (1895). See J. H. Riddle, *The Supreme Court's Theory of a Direct Tax*, 15 Mich.L.Rev. 566 (1917).

2. It has been stated that a tax on the value of a shareholder's interest in the corporate surplus would be a direct tax, *Eisner v. Macomber*, 252 U.S. 189, 40 S.Ct. 189, 64 L.Ed. 521 (1920).

3. It has been frequently argued that a retroactive excise tax on a privilege completely exercised before the enactment of the statute imposing it is a direct tax. The Supreme Court has never sustained the argument. See *Milliken v. U. S.*, 283 U.S. 15, 51 S.Ct. 324, 75 L.Ed. 809 (1931).

4. The Sixteenth Amendment has given rise to a considerable body of litigation concerning the meaning of the term "income" as used therein. The most controversial issue of this character concerns the nature of stock dividends; see *Eisner v. Macomber*, 252 U.S. 189, 40 S.Ct. 189, 64 L.Ed. 521 (1920); *Koshland v. Helvering*, 298 U.S. 441, 56 S.Ct. 767, 80 L.Ed. 1268 (1936); *Helvering v. Griffiths*, 318 U.S. 371, 63 S.Ct. 636, 87 L.Ed. 843 (1943); H. Rottschaefer, *Present Taxable Status of Stock Dividends in Federal Tax Law*, 28 Minn.L.Rev. 106, 163 (1944). As to status of capital receipts, see *Edwards v. Cuba R. Co.*, 268 U.S. 628, 45 S.Ct. 614, 69 L.Ed. 1124 (1925); of capital gains, see *Merchants' Loan & Trust Co. v. Smietanka*, 255 U.S. 509, 41 S.Ct. 386, 65 L.Ed. 751 (1921). For general discussions of problem, see R. Magill, *When Is Income Realized?*, 46 Harv.L.Rev. 933 (1933); H. Rottschaefer, *The Concept of Income in Federal Taxation*, 13 Minn.L.Rev. 637 (1929).

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### PECK & CO. v. LOWE.

Supreme Court of the United States, 1918. 247 U.S. 165, 38 S.Ct. 432, 62 L.Ed. 1049.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This was an action to recover a tax paid under protest and alleged to have been imposed contrary to the constitutional provision (U.S.C.A.Const. art. 1, § 9, cl. 5) that "no tax or duty shall be laid on articles exported from any state." The judgment below was for the defendant. 234 F. 125.

The plaintiff is a domestic corporation chiefly engaged in buying goods in the several states, shipping them to foreign countries and there selling them. In 1914 its net income from this business was \$30,173.66, and from other sources \$12,436.24. An income tax for that year, computed on the aggregate of these sums, was assessed against it and paid under compulsion. It is conceded that so much of the tax as was based on the income from other sources was valid, and the controversy is over so much of it as was attributable to the income from shipping goods to foreign countries and there selling them.

The tax was levied under the Act of October 3, 1913, c. 16, § 11, 38 Stat. 166, 172, which provided for annually subjecting every domestic corporation to the payment of a tax of a specified per centum of its "entire net income arising or accruing from all sources during the preceding calendar year." Certain fraternal and other corporations, as also income from certain enumerated sources, were specifically excepted, but none of the exceptions included the plaintiff or any part of its income. So,

tested merely by the terms of the act, the tax collected from the plaintiff was rightly computed on its total net income. But as the act obviously could not impose a tax forbidden by the Constitution, we proceed to consider whether the tax, or rather the part in question, was forbidden by the constitutional provision on which the plaintiff relies.

The Sixteenth Amendment, U.S.C.A.Const. Amend. 16, although referred to in argument, has no real bearing and may be put out of view. As pointed out in recent decisions, it does not extend the taxing power to new or excepted subjects, but merely removes all occasion, which otherwise might exist, for an apportionment among the states of taxes laid on income, whether it be derived from one source or another. *Brushaber v. Union Pacific R. R. Co.*, 240 U.S. 1, 17-19, 36 S.Ct. 236, 60 L.Ed. 493, Ann.Cas.1917B, 713, L.R.A.1917D, 414; *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112-113, 36 S.Ct. 278, 60 L.Ed. 546.

The Constitution broadly empowers Congress not only "to lay and collect taxes, duties, imposts, and excises," but also "to regulate commerce with foreign nations." So, if the prohibitory clause invoked by the plaintiff be not in the way, Congress undoubtedly has power to lay and collect such a tax as is here in question. That clause says "no tax or duty shall be laid on articles exported from any state." Of course it qualifies and restricts the power to tax as broadly conferred. But to what extent? The decisions of this court answer that it excepts from the range of that power articles in course of exportation, *Turpin v. Burgess*, 117 U.S. 504, 507, 6 S.Ct. 835, 29 L.Ed. 988; the act or occupation of exporting, *Brown v. Maryland*, 12 Wheat. 419, 445, 6 L.Ed. 678; bills of lading for articles being exported, *Fairbank v. United States*, 181 U.S. 283, 21 S.Ct. 648, 45 L.Ed. 862; charter parties for the carriage of cargoes from state to foreign ports, *United States v. Hvoslef*, 237 U.S. 1, 35 S.Ct. 459, 59 L.Ed. 813, Ann.Cas.1916A, 286; and policies of marine insurance on articles being exported—such insurance being uniformly regarded as "an integral part of the exportation" and the policy as "one of the ordinary shipping documents," *Thames & Mersey Ins. Co. v. United States*, 237 U.S. 19, 35 S.Ct. 496, 59 L.Ed. 821, Ann.Cas.1915D, 1087. In short, the court has interpreted the clause as meaning that exportation must be free from taxation, and therefore as requiring "not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation." *Fairbank v. United States*, supra, 181 U.S. 292, 293, 21 S.Ct. 648, 45 L.Ed. 862. And the court has indicated that where the tax is not laid on the articles themselves while in course of exportation the true test of its validity is whether it "so directly and closely" bears on

the "process of exporting" as to be in substance a tax on the exportation. *Thames & Mersey Ins. Co. v. United States*, supra, 237 U.S. 25, 35 S.Ct. 496, 59 L.Ed. 821, Ann.Cas.1915D, 1087. In this view it has been held that the clause does not condemn or invalidate charges or taxes, not laid on property while being exported, merely because they affect exportation indirectly or remotely. Thus a charge for stamps which each package of manufactured tobacco intended for export was required to bear before removal from the factory was upheld in *Pace v. Burgess*, 92 U.S. 372, 23 L.Ed. 657, and *Turpin v. Burgess*, 117 U.S. 504, 6 S.Ct. 835, 29 L.Ed. 988; and the application of a manufacturing tax on all filled cheese to cheese manufactured under contract for export, and actually exported, was upheld in *Cornell v. Coyne*, 192 U.S. 418, 427, 24 S.Ct. 383, 384, 48 L. Ed. 504. In that case it was said:

"The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation."

While fully assenting and adhering to the interpretation which has been put on the clause in giving effect to its spirit as well as its letter, we are of opinion that to broaden that interpretation would be to depart from both the spirit and letter.

The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see *Stanton v. Baltic Mining Co.*, supra, 240 U.S. p. 113, 36 S.Ct. 278, 60 L.Ed. 546), it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are "net income arising or accruing from all sources." There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of ex-

portation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation.

For these reasons we hold that the objection urged against the tax is not well grounded.

Judgment affirmed.

#### NOTE

1. See *C. N. Goodwin, U. S. v. Hoosleff*, 29 Harv.L.Rev. 469 (1916).
2. It was once held that the provisions of U.S.Const., Art. 3, Sec. 1, prohibiting the diminution of the salaries of federal judges prevented levying a federal income tax upon their salaries, *Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887 (1920); *Miles v. Graham*, 268 U.S. 501, 45 S.Ct. 601, 69 L.Ed. 1067 (1925). It is doubtful that said provision invalidates such tax at present. *O'Malley v. Woodrough*, 307 U.S. 277, 59 S.Ct. 838, 83 L.Ed. 1289 (1939).
3. While it was once asserted by Chief Justice White in *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493 (1916); that the due process clause of Const.U.S. Amend. 5, was not a limit on federal taxing power, it was later held to be such in *Nichols v. Coolidge*, 274 U.S. 531, 47 S.Ct. 710, 71 L.Ed. 1184 (1927), involving retroactive application of a provision of the Federal Estate Tax, and in *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932), invalidating an irrebuttable presumption found in the same tax act. So far no case has held that the United States had exceeded any jurisdictional limits imposed on its taxing power by it; see *Cook v. Tait*, 265 U.S. 47, 44 S.Ct. 444, 68 L.Ed. 895 (1923) (income tax); *Burnet v. Brooks*, 288 U.S. 378, 53 S.Ct. 457, 77 L.Ed. 844 (1933) (estate tax). Nor has the Supreme Court yet held said due process clause to have been violated by any tax classification made by Congress; see *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493 (1916); *C. C. Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937). See *J. H. Amberg, Retroactive Excise Taxation*, 37 Harv.L.Rev. 691 (1924); *J. P. Hall, Retroactive Federal Inheritance Tax*, 22 Ill.L.Rev. 437 (1928).

**NORMAN v. BALTIMORE & OHIO R. CO.**

Supreme Court of the United States, 1935. 294 U.S. 240, 55 S.Ct. 407,  
79 L.Ed. 885, 95 A.L.R. 1352.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

These cases present the question of the validity of the Joint Resolution of the Congress, of June 5, 1933, with respect to the "gold clauses" of private contracts for the payment of money. 48 Stat. 112, 31 U.S.C.A. §§ 462, 463.

This resolution, the text of which is set forth in the margin, declares that "every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby" is "against public policy." Such provisions in obligations thereafter incurred are prohibited. The resolution provides that "Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

In No. 270, the suit was brought upon a coupon of a bond made by the Baltimore & Ohio Railroad Company under date of February 1, 1930, for the payment of \$1,000 on February 1, 1960, and interest from date at the rate of 4½ per cent. per annum, payable semiannually. The bond provided that the payment of principal and interest "will be made \* \* \* in gold coin of the United States of America of or equal to the standard of weight and fineness existing on February 1, 1930." The coupon in suit, for \$22.50, was payable on February 1, 1934. The complaint alleged that on February 1, 1930, the standard weight and fineness of a gold dollar of the United States as a unit of value "was fixed to consist of twenty-five and eight-tenths grains of gold, nine-tenths fine," pursuant to the Act of Congress of March 14, 1900 (31 Stat. 45, § 1, 31 U.S.C.A. § 314), and that by the Act of Congress known as the Gold Reserve Act of 1934 (January 30, 1934, 48 Stat. 337), and by the order of the President under that act, the standard unit of value of a gold dollar of the United States "was fixed to consist of fifteen and five-twenty-firsts grains of gold, nine-tenths fine," from and after January 31, 1934. On presentation of the coupon, defendant refused to pay the amount in gold, or the equivalent of gold in legal tender of the United States which was alleged to be, on February 1, 1934, according to the standard of weight and fineness existing on February 1, 1930, the sum of \$38.10, and plaintiff demanded judgment for that amount.

Defendant answered that by acts of Congress, and, in particular, by the Joint Resolution of June 5, 1933, defendant had been prevented from making payment in gold coin "or otherwise than dollar for dollar, in coin or currency of the United States (other than gold coin and gold certificates)," which at the time of payment constituted legal tender. Plaintiff, challenging the validity of the Joint Resolution under the Fifth and Tenth Amendments, and article 1, § 1, of the Constitution of the United States, U.S.C. A.Const. amends. 5, 10; art. 1, § 1, moved to strike the defense. The motion was denied. Judgment was entered for plaintiff for \$22.50, the face of the coupon, and was affirmed upon appeal. The Court of Appeals of the state considered the federal question and decided that the Joint Resolution was valid. 265 N.Y. 37, 191 N.E. 726, 92 A.L.R. 1523. This Court granted a writ of certiorari October 8, 1934, 293 U.S. 546, 55 S.Ct. 103, 79 L.Ed. 650.

\* \* \*

*Second. The Power of the Congress to Establish a Monetary System.*—It is unnecessary to review the historic controversy as to the extent of this power, or again to go over the ground traversed by the Court in reaching the conclusion that the Congress may make Treasury notes legal tender in payment of debts previously contracted, as well as of those subsequently contracted, whether that authority be exercised in course of war or in time of peace. *Knox v. Lee* (Legal Tender Cases) 12 Wall. 457, 20 L. Ed. 237; *Juilliard v. Greenman*, Legal Tender Cases, 110 U.S. 421, 4 S.Ct. 122, 28 L.Ed. 204. We need only consider certain postulates upon which that conclusion rested.

The Constitution grants to the Congress power "To coin Money, regulate the Value thereof, and of foreign Coin." Article 1, § 8, par. 5, U.S.C.A.Const. art. 1, § 8, par. 5. But the Court in the legal tender cases did not derive from that express grant alone the full authority of the Congress in relation to the currency. The Court found the source of that authority in all the related powers conferred upon the Congress and appropriate to achieve "the great objects for which the government was framed"—"a national government, with sovereign powers." *McCulloch v. Maryland*, 4 Wheat. 316, 404-407, 4 L.Ed. 579; *Knox v. Lee*, *supra*, pages 532, 536 of 12 Wall.; *Juilliard v. Greenman*, *supra*, page 438 of 110 U.S., 4 S.Ct. 122, 125. The broad and comprehensive national authority over the subjects of revenue, finance, and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several states, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power "to make

all laws which shall be necessary and proper for carrying into execution" the other enumerated powers. *Juilliard v. Greenman*, supra, pages 439, 440 of 110 U.S., 4 S.Ct. 122, 125.

The Constitution "was designed to provide the same currency, having a uniform legal value in all the States." It was for that reason that the power to regulate the value of money was conferred upon the federal government, while the same power, as well as the power to emit bills of credit, was withdrawn from the states. The states cannot declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in the Congress. *Knox v. Lee*, supra, page 545 of 12 Wall. Another postulate of the decision in that case is that the Congress has power "to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts, or to multiples thereof." *Id.*, page 553 of 12 Wall. Or, as was stated in the *Juilliard Case*, supra, page 447 of 110 U.S., 4 S.Ct. 122, 129, the Congress is empowered "to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments." The authority to impose requirements of uniformity and parity is an essential feature of this control of the currency. The Congress is authorized to provide "a sound and uniform currency for the country," and to "secure the benefit of it to the people by appropriate legislation." *Veazie Bank v. Fenno*, 8 Wall. 533, 549, 19 L.Ed. 482.

Moreover, by virtue of this national power, there attaches to the ownership of gold and silver those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange. *Ling Su Fan v. United States*, 218 U.S. 302, 310, 31 S.Ct. 21, 23, 54 L.Ed. 1049, 30 L.R.A., N.S., 1176. Those limitations arise from the fact that the law "gives to such coinage a value which does not attach as a mere consequence of intrinsic value." Their quality as legal tender is attributed by the law, aside from their bullion value. Hence the power to coin money includes the power to forbid mutilation, melting, and exportation of gold and silver coin—"to prevent its outflow from the country of its origin." *Id.*, page 311 of 218 U.S., 31 S.Ct. 21, 23.

Dealing with the specific question as to the effect of the Legal Tender Acts upon contracts made before their passage, that is, those for the payment of money generally, the Court, in the legal tender cases, recognized the possible consequences of such enactments in frustrating the expected performance of contracts—in rendering them "fruitless, or partially fruitless." The Court

pointed out that the exercise of the powers of Congress may affect "apparent obligations" of contracts in many ways. The Congress may pass bankruptcy acts. The Congress may declare war, or, even in peace, pass nonintercourse acts, or direct an embargo, which may operate seriously upon existing contracts. And the Court reasoned that, if the Legal Tender Acts "were justly chargeable with impairing contract obligations, they would not, for that reason, be forbidden, unless a different rule is to be applied to them from that which has hitherto prevailed in the construction of other powers granted by the fundamental law." The conclusion was that contracts must be understood as having been made in reference to the possible exercise of the rightful authority of the government, and that no obligation of a contract "can extend to the defeat" of that authority. *Knox v. Lee*, supra, pages 549-551 of 12 Wall.

On similar grounds, the Court dismissed the contention under the Fifth Amendment forbidding the taking of private property for public use without just compensation or the deprivation of it without due process of law. That provision, said the Court, referred only to a direct appropriation. A new tariff, an embargo, or a war, might bring upon individuals great losses; might, indeed, render valuable property almost valueless—might destroy the worth of contracts. "But whoever supposed" asked the Court, "that, because of this, a tariff could not be changed or a nonintercourse act, or embargo be enacted, or a war be declared." The Court referred to the Act of June 28, 1834 (4 Stat. 699), by which a new regulation of the weight and value of gold coin was adopted, and about 6 per cent. was taken from the weight of each dollar. The effect of the measure was that all creditors were subjected to a corresponding loss, as the debts then due "became solvable with six per cent. less gold than was required to pay them before." But it had never been imagined that there was a taking of private property without compensation or without due process of law. The harshness of such legislation, or the hardship it may cause, afforded no reason for considering it to be unconstitutional. *Id.*, pages 551, 552 of 12 Wall.

The question of the validity of the Joint Resolution of June 5, 1933, must be determined in the light of these settled principles.

*Third. The Power of the Congress to Invalidate the Provisions of Existing Contracts Which Interfere with the Exercise of Its Constitutional Authority.*—The instant cases involve contracts between private parties, but the question necessarily relates as well to the contracts or obligations of states and municipalities, or of their political subdivisions; that is, to such engagements as are within the reach of the applicable national power. The

government's own contracts—the obligations of the United States—are in a distinct category and demand separate consideration. See *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912, decided this day.

The contention is that the power of the Congress, broadly sustained by the decisions we have cited in relation to private contracts for the payment of money generally, does not extend to the striking down of express contracts for gold payments. The acts before the Court in the legal tender cases, as we have seen, were not deemed to go so far. Those acts left in circulation two kinds of money, both lawful and available, and contracts for payments in gold, one of these kinds, were not disturbed. The Court did not decide that the Congress did not have the constitutional power to invalidate existing contracts of that sort, if they stood in the way of the execution of the policy of the Congress in relation to the currency. Mr. Justice Bradley, in his concurring opinion, expressed the view that the Congress had that power and had exercised it. *Knox v. Lee*, *supra*, pages 566, 567 of 12 Wall. And, upon that ground, he dissented from the opinion of the Court in *Trebilcock v. Wilson*, *supra*, page 699 of 12 Wall., as to the validity of contracts for payment "*in specie*." It is significant that Mr. Justice Bradley, referring to this difference of opinion in the legal tender cases, remarked (in his concurring opinion) that "of course" the difference arose "from the different construction given to the legal tender acts." "I do not understand," he said, "the majority of the court to decide that an act so drawn as to embrace, in terms, contracts payable in specie, would not be constitutional. Such a decision would completely nullify the power claimed for the government. For it would be very easy, by the use of one or two additional words, to make all contracts payable in specie."

Here, the Congress has enacted an express interdiction. The argument against it does not rest upon the mere fact that the legislation may cause hardship or loss. Creditors who have not stipulated for gold payments may suffer equal hardship or loss with creditors who have so stipulated. The former admittedly, have no constitutional grievance. And, while the latter may not suffer more, the point is pressed that their express stipulations for gold payments constitute property, and that creditors who have not such stipulations are without that property right. And the contestants urge that the Congress is seeking, not to regulate the currency, but to regulate contracts, and thus has stepped beyond the power conferred.

This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of prop-

erty, but, when contracts deal with a subject-matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. See *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357, 28 S.Ct. 529, 52 L.Ed. 828, 14 Ann.Cas. 560. \* \* \*

The principle is not limited to the incidental effect of the exercise by the Congress of its constitutional authority. There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt. The exercise of this power is illustrated by the provision of section 5 of the Employers' Liability Act of 1908 (35 Stat. 65, 66, 45 U.S.C.A. § 55) relating to any contract the purpose of which was to enable a common carrier to exempt itself from the liability which the act created. Such a stipulation the act explicitly declared to be void. In the *Second Employers' Liability Cases* (*Mondou v. New York, N.H. & H. R. Co.*), 223 U.S. 1, 52, 32 S.Ct. 169, 176, 56 L.Ed. 327, 38 L.R.A., N.S., 44, the Court decided that, as the Congress possessed the power to impose the liability, it also possessed the power "to insure its efficacy by prohibiting any contract, rule, regulation, or device in evasion of it." And this prohibition the Court has held to be applicable to contracts made before the act was passed. *Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U.S. 603, 32 S.Ct. 589, 56 L.Ed. 911. In that case, the employee suing under the act was a member of the "Relief Fund" of the railroad company under a contract of membership, made in 1905, for the purpose of securing certain benefits. The contract provided that an acceptance of those benefits should operate as a release of claims, and the company pleaded that acceptance as a bar to the action. The Court held that the Employers' Liability Act, 45 U.S.C.A. §§ 51-59, supplied the governing rule and that the defense could not be sustained. The power of the Congress in regulating interstate commerce was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. The reason is manifest. To subordinate the exercise of the federal authority to the continuing operation of previous contracts would be to place to this extent the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of the Congress so much of the field as they might choose by "prophetic discernment" to bring within the range of their agreements. The Constitution recognizes no such limitation. *Id.*, pages 613, 614 of 224 U.S., 32 S.Ct. 589. See, also, *United States*

v. Southern Pacific Company, *supra*; *Sproles v. Binford*, 286 U. S. 374, 390, 391, 52 S.Ct. 581, 76 L.Ed. 1167; *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 282, 53 S.Ct. 627, 77 L.Ed. 1166.

The same reasoning applies to the constitutional authority of the Congress to regulate the currency and to establish the monetary system of the country. If the gold clauses now before us interfere with the policy of the Congress in the exercise of that authority, they cannot stand. \* \* \*

We are not concerned with consequences, in the sense that consequences, however serious, may excuse an invasion of constitutional right. We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts. In the light of abundant experience, the Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority. The contention that these gold clauses are valid contracts and cannot be struck down proceeds upon the assumption that private parties, and states and municipalities, may make and enforce contracts which may limit that authority. Dismissing that untenable assumption, the facts must be faced. We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress, and certainly it is not established that the Congress arbitrarily or capriciously decided that such an interference existed.

The judgment and decree, severally under review are affirmed.

[Messrs. Justices McREYNOLDS, VAN DEVANTER, SUTHERLAND and BUTLER dissented.]

#### NOTE

1. The fiscal powers of the United States include, in addition to that of taxation, those of coining money and regulating its value (Const.U.S. art. 1, § 8, cl. 5) and of borrowing money on the credit of the United States (Const.U.S. art. 1, § 8, cl. 2). One or both have constituted the principal basis for Congressional creation of a national banking system; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819); the Federal Land Bank System, *Smith v. Kansas City Title and Trust Co.*, 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (1921); authorizing the issue of fiat money, *Legal Tender Cases*, 12 Wall. 457, 20 L.Ed. 287 (1871); and legislation in effect taxing out of existence circulating notes of state banks, *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L.Ed. 482 (1869).

2. The national power over the currency is also protected against state action by the provisions of U.S.Const., Art. 1, Sec. 10, prohibiting the states from coining money, emitting bills of credit, and making anything but gold and silver coin legal tender in the payment of debts. For cases construing these provisions, see *Craig v. Missouri*, 4 Pet. 410, 7 L.Ed. 903 (1830); *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 9 L.Ed. 709 (1837); *Pointdexter v. Greenhow*, 114 U.S. 270, 5 S.Ct. 903, 29 L.Ed. 185 (1885); *Lane County v. Oregon*, 7 Wall. 71, 19 L.Ed. 101 (1868).

3. The application of the Act of Congress voiding the gold clauses was held invalid as applied to bonds of the United States issued prior thereto in *Perry v. U. S.*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935). The Court relied in part upon the provision of U.S. Const., Amend. 14, Sec. 4, that "The validity of the Public Debt of the United States, authorized by law, \* \* \* shall never be questioned."

## CHAPTER 8

### FEDERAL COMMERCE POWER

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#### GIBBONS v. OGDEN.

Supreme Court of United States, 1824. 9 Wheat. 1, 6 L.Ed. 23.

[Error to the Court for Trial of Impeachments and Correction of Errors of New York. A New York statute granted to Livingston and Fulton the exclusive right to navigate the waters of the state by steamboats for a period of years, and by assignment Ogden secured the right to navigate between New York City and places in New Jersey. Ogden secured an injunction in the state court against the violation of this right by Gibbons, who was using, in navigation between New York and New Jersey, two steamboats enrolled and licensed in the coasting trade under the act of Congress of 1793 (1 Stat. 305, c. 8). From an affirmation of this decree the case was brought here.]

Mr. Chief Justice MARSHALL. The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains are repugnant to the Constitution and laws of the United States. \* \* \* The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more,—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for

the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the Constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself. It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted,—that which the words of the grant could not comprehend. If, then, there are in the Constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article U.S.C.A.Const. art. 1, § 9, declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united in that construction which comprehends navi-

gation in the word "commerce." Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade. That it may be, and often is, used as an instrument of war, cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case an embargo is no more a war measure than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen. \* \* \*

The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The Constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes." U.S.C.A.Const. art. 1, § 8, cl. 3. It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary-line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.

This principle is, if possible, still more clear when applied to commerce "among the several states." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the states must, of necessity, be commerce with the states. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was made,

was chiefly within a state. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods by land between [Boston] and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. \* \* \* The power of Congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness that, although the power of Congress to regulate commerce with foreign nations, and among the several states, be coextensive with the subject itself, and have no other limits than are prescribed in the Constitution, yet the states may severally exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty before the formation of the Constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description. The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the

existence of a right in another to any part of it. Both parties have appealed to the Constitution, to legislative acts, and judicial decisions; and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the states are transferred to the government of the Union, yet the state governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not in its nature incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defence and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry because it has been exercised,

and the regulations which Congress deemed it proper to make are now in full operation. The sole question is, can a state regulate commerce with foreign nations and among the states while Congress is regulating it? \* \* \*

But the inspection laws are said to be regulations of commerce, and are certainly recognized in the Constitution as being passed in the exercise of a power remaining with the states. That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to a general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

No direct general power over these objects is granted to Congress, and consequently they remain subject to state legislation. If the legislative power of the Union can reach them it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers,—that, for example, of regulating commerce with foreign nations and among the states,—may use means that may also be employed by a state in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state. If Congress license vessels to sail from one port to another in the same state, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police. So if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each

other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one general government whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

\* \* \*

It has been contended by the counsel for the appellant that, as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted. \* \* \*

It has been said that the Constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it. In the exercise of this power, Congress has passed "An act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise. It will at once occur that when a legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone if the right itself be annihilated. \* \* \*

The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the

coasting trade;" and prescribes its form. \* \* \* The word "license" means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license. \* \* \*

But if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers, and this is no part of that commerce which Congress may regulate. If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive, argument to prove that the construction is correct; and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. \* \* \* [The law of New York was held to be inconsistent with the license granted by act of Congress.]

Judgment reversed.

[JOHNSON, J., concurred upon the ground that the power of Congress to regulate commerce was exclusive, and that the licensing act did not affect the case.]

#### NOTE

1. The reported case was the Supreme Court's first extensive exposition of the meaning of the principal terms of the commerce clause. The meaning of the phrase "interstate commerce" is of crucial importance both in defining the extent of the federal power of regulation, and in determining the extent to which the commerce clause limits state powers. As the result of a long series of decisions it is held today to include transportation of goods and persons, and the transmission of intelligence, from state to state or from a point in one state to another point therein by a route passing through another state, *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956 (1936); *Hanley v. Kansas City Southern Ry. Co.*, 187 U.S. 617, 23 S.Ct. 214, 47 L.Ed. 333 (1903); the performance of services that are an integral part of such transportation, *Puget Sound Stevedoring Co. v. Tax Comm. of State of Washington*, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68 (1937); the solicitation of orders for, and the buying and selling of, goods where these transactions contemplate or necessarily involve the movement of goods in interstate commerce, or where they constitute an integral part of a course of business constitut-

ing such commerce, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 (1921); *Crenshaw v. Arkansas*, 227 U.S. 389, 33 S.Ct. 294, 58 L.Ed. 565 (1914); *Lemke v. Farmers' Grain Co.*, 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458 (1922); *Wagner v. Covington*, 251 U.S. 95, 40 S.Ct. 93, 64 L.Ed. 157 (1919); *U. S. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). Cf. *Wiloil Corp. v. Pennsylvania*, 294 U.S. 169, 55 S.Ct. 358, 79 L.Ed. 838 (1935), and *Williams v. Fears*, 179 U.S. 270, 21 S.Ct. 128, 45 L.Ed. 186 (1900). An activity, or a transaction, if otherwise constituting interstate commerce, is not removed from that category because not motivated by commercial or economic considerations, *Cominetti v. U. S.*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917); *U. S. v. Hill*, 248 U.S. 420, 39 S.Ct. 143, 63 L.Ed. 337 (1919).

2. The power to regulate interstate commerce is not limited to regulating activities or transactions that are themselves interstate commerce, but includes that of regulating intrastate activities and transactions because of their relation, or the relation of the regulation imposed upon them, to interstate commerce. Many of the subsequent cases reported in this chapter illustrate that principle.

### UNITED STATES v. FERGER et al.

Supreme Court of the United States, 1919.  
250 U.S. 199, 39 S.Ct. 445, 63 L.Ed. 936.

Mr. Chief Justice WHITE delivered the opinion of the Court.

The 24 counts of the indictment in this case were concerned with the commission of acts defined as criminal and punished by the forty-first section of the Act of August 29, 1916, entitled, "An act relating to bills of lading in interstate and foreign commerce." 39 Stat. 538, 544, c. 415 (Comp.St. § 8604u).

In the first count it was charged that the accused, in violation of the section, on or about the 14th day of August, 1917, in Cincinnati, Ohio—

"did \* \* \* feloniously, and with intent to defraud, falsely make, forge, and counterfeit, and aid and assist in feloniously making, forging, and counterfeiting, a certain bill of lading purporting to represent goods received at Fountaintown, in the state of Indiana, for shipment to Cincinnati, in the state of Ohio, and to utter and publish and aid and assist in uttering and publishing such falsely made, forged, and counterfeited bill of lading, then and there knowing the same to be falsely made, forged, and counterfeited. \* \* \*"

A copy of the fabricated bill of lading was reproduced in the count. It was negotiable in form, following the standard approved by the Interstate Commerce Commission (Order No. 787, June 27, 1908). The bill acknowledged the receipt by the Cin-

cinnati, Hamilton & Dayton Railway Company of corn in bulk at a designated place in Indiana, shipped to Cincinnati to the order of the shipper, and with directions to notify a person named. It contained all the \*earmarks which would have been found in a genuine bill of lading.

The second count charged the knowing, willful, and felonious uttering of the bill of lading, and, with criminal intent and knowledge, obtaining money on it from the Second National Bank of Cincinnati by using it as collateral.

These first 2 counts are types of the remaining 22, except that the latter dealt with 11 other bills of lading as to each of which there were 2 counts, charging in the exact words used in the first and second counts, on the one hand the felonious fabricating and uttering of a bill of lading, and on the other hand the uttering and obtaining on the same bill of money from the Second National Bank of Cincinnati.

There was a motion to quash all the counts based upon alleged defects in pleading with which we are not concerned, and by demurrer the failure of the indictment to charge an offense was asserted on these grounds:

"First. That said Act of Congress \* \* \* approved August 29, 1916, is unconstitutional and void, especially section 41 of said act in so far as it attempts to make it a crime and punish any person who forges or counterfeits a bill of lading where no shipment from one state to another is made or intended.

"Second. That said act can only apply to bills of lading representing actual shipments of merchandise or commerce between the states. If it is intended to apply to wholly fictitious shipments it is unconstitutional and void so far as said fictitious shipments are concerned, because the power of Congress to legislate upon this subject matter is based wholly and solely upon the commercial clause of the Constitution, and if there is no commerce, there is no jurisdiction."

The demurrer was sustained and all the counts in the indictment were dismissed (256 F. 388). The court said:

"It was agreed in the argument and assumed in the briefs of counsel that the so-called bills of lading were fictitious, in that there was no actual consignor or consignee and that they did not relate to any shipment or attempted shipment of corn whatsoever. This fact so agreed upon in open court is to be read into the indictments."

Dealing with the case thus made, the court observed:

"These bogus bills of lading were nothing but pieces of paper, fraudulently inscribed to represent a real contract between real people and the actual receipt of goods for interstate shipment.

\* \* \* That they were inscribed so as to purport to relate to interstate shipments was nothing else than a fraud upon such persons as innocently took them, as collateral or otherwise. The execution of them and their use for obtaining money under false pretenses was nothing other than a crime of a kind cognizable by the criminal legislation of the states, and a matter with which the Congress, in the exercise of its power to regulate commerce, is not concerned."

And upon these premises, after reviewing what were deemed to be the controlling authorities, it was concluded that the case—"must be decided in favor of the defendants, and the holding made that the Congress has not the power, under the commerce clause, to prescribe a punishment under the circumstances of this case, and if the Congress has sought to do so, the attempt is futile, because without authority."

Despite the hypothetical form in which this conclusion is expressed, the context of the opinion makes it certain that, reading the facts charged in the indictment in the light of the admissions made at the argument, the court construed the section of the statute as embracing such acts and decided that as thus construed it was void for repugnancy to the Constitution.

At the outset confusion in considering the issue may result unless obscurity begotten by the form in which the contention is stated be dispelled. Thus both in the pleadings and in the contention as summarized by the court below it is insisted that, as there was and could be no commerce in a fraudulent and fictitious bill of lading, therefore the power of Congress to regulate commerce could not embrace such pretended bill. But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce [In re Debs, 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092] and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves. It would be superfluous to refer to the authorities which from the foundation of the government have measured the exertion by Congress of its power to regulate commerce by the principle just stated, since the doctrine is elementary and is but an expression of the text of the Constitution (article 1, § 8, cl. 18). A case dealing with a some-

what different exercise of power, but affording a good illustration of the application of the principle to the subject in hand, is *First National Bank v. Union Trust Co.*, 244 U.S. 416, 37 S.Ct. 734, 61 L.Ed. 1233, L.R.A.1918C, 283, Ann.Cas.1918D, 1169.

Although some of the forms of expression used in the opinion below might serve to indicate that the error just referred to had found lodgment in the mind of the court, the context of the opinion makes it certain that such was not the case, since the court left no obscurity in its statement of the issue which it decided, saying "They [the fictitious bills of lading] did not affect commerce directly or indirectly. They did not obstruct or interfere with it in any manner and had nothing whatever to do with it, or with any existing instrumentality of it."

This statement not only clearly and accurately shows the question decided, but also with precision and directness points out the single and simple question which we must consider and dispose of in order to determine whether the court below erred in holding that the authority of Congress to regulate commerce did not embrace the power to forbid and punish the fraudulent fabrication and use of fictitious interstate bills of lading.

That bills of lading for the movement of interstate commerce are instrumentalities of that commerce which Congress under its power to regulate commerce has the authority to deal with and provide for is too clear for anything but statement, as manifested not only by that which is concluded by prior decisions, but also by the exertion of the power by Congress. Nothing could better illustrate this latter view than do the general provisions of the act, the forty-first section of which is before us. See, also, Act of June 29, 1906, c. 3591, § 7, 34 Stat. 584, 593 (U.S.Comp.St. §§ 8604a, 8604aa); Act of June 18, 1910, 36 Stat. 546, c. 309, § 7 (Comp.St. § 8563); *Almy v. California*, 24 How. 169, 16 L.Ed. 644; *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19, 26, 35 S.Ct. 496, 59 L.Ed. 821, Ann.Cas.1915D, 1087; *Atchison, Topeka & Santa Fé Railway Co. v. Harold*, 241 U.S. 371, 378, 36 S.Ct. 665, 60 L.Ed. 1050; *Luckenbach v. McCahan Sugar Refining Co.*, 248 U.S. 139, 39 S.Ct. 53, 63 L.Ed. 170; *Missouri, Kansas & Texas Railway Co. v. Sealy*, 248 U.S. 363, 39 S.Ct. 97, 63 L.Ed. 296. That, as instrumentalities of interstate commerce, bills of lading are the efficient means of credit resorted to for the purpose of securing and fructifying the flow of a vast volume of interstate commerce upon which the commercial intercourse of the country, both domestic and foreign, largely depends, is a matter of common knowledge as to the course of business of which we may take judicial notice. Indeed, that such bills of lading and the faith and credit given to their genuineness and the

value they represent are the producing and sustaining causes of the enormous number of transactions in domestic and foreign exchange is also so certain and well known that we may notice it without proof.

With this situation in mind the question therefore is: Was the court below right in holding that Congress had no power to prohibit and punish the fraudulent making of spurious interstate bills of lading as a means of protecting and sustaining the vast volume of interstate commerce operating and moving in reliance upon genuine bills? To state the question is to manifest the error which the court committed, unless that view is overcome by the reasoning by which the conclusion below was sought to be sustained. What was that reasoning? That the bills were but "pieces of paper fraudulently inscribed \* \* \* and did not affect commerce directly or indirectly \* \* \* and had nothing whatever to do with it or any existing instrumentality of it." But this rests upon the unsustainable assumption that the undoubted power which existed to regulate the instrumentality, the genuine bill, did not give any power to prevent the fraudulent and spurious imitation. It proceeds further, as we have already shown, upon the erroneous theory that the credit and confidence which sustains interstate commerce would not be impaired or weakened by the unrestrained right to fabricate and circulate spurious bills of lading apparently concerning such commerce. Nor is the situation helped by saying that, as the manufacture and use of the spurious interstate commerce bills of lading were local, therefore the power to deal with them was exclusively local, since the proposition disregards the fact that the spurious bills were in the form of interstate commerce bills which in and of themselves involved the potentiality of fraud as far-reaching and all-embracing as the flow of the channels of interstate commerce in which it was contemplated the fraudulent bills would circulate. As the power to regulate the instrumentality was coextensive with interstate commerce, so it must be, if the authority to regulate is not to be denied, that the right to exert such authority for the purpose of guarding against the injury which would result from the making and use of spurious imitations of the instrumentality must be equally extensive.

We fail to understand the danger to the powers of government of the several states which it is suggested must arise from sustaining the validity of the provisions of the act of Congress in question. On the contrary, we are of opinion that to deny the power asserted would be to depart from the text of the Constitution and to overthrow principles of interpretation which, as we have seen, have been settled since *McCulloch v. Maryland*, 4

Wheat. 316, 4 L.Ed. 579, and which in application have never been deviated from.

This conclusion remains unshaken despite an examination of the decided cases cited by the court below in its opinion or which were pressed upon our attention in argument, since in our judgment they all but express the general principles of interpretation which we have applied and which are decisive against the contention of want of power in Congress which was upheld below and is here insisted upon.

It follows that the judgment below was wrong. It must therefore be reversed, and the case be remanded for further proceedings in conformity with this opinion.

And it is so ordered.

Mr. Justice PITNEY dissents.

#### NOTE

1. It was not until the economic development of the nation was already well along that Congress began to exercise its commerce power on any extensive scale for the purpose of regulating the national economy. The Interstate Commerce Commission Act of 1887 and the Sherman Anti-Trust Act of 1890 were the first important statutes enacted for that purpose. Various provisions of the former were sustained in *New York Cent. & H. R. R. Co. v. U. S.*, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613 (1909); *Adams Express Co. v. Croninger*, 226 U.S. 491, 33 S.Ct. 148, 57 L.Ed. 314 (1913). The scope of the regulations has been expanded by frequent amendments of the Act to permit federal regulation of intrastate railroad rates, sustained in *Railroad Comm. of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 385 (1922); and to control more and more inter-carrier relationships with respect to interstate transportation, *New England Divisions Case*, 261 U.S. 184, 43 S.Ct. 270, 67 L.Ed. 605 (1923); *Dayton-Goose Creek Ry. Co. v. U. S.*, 263 U.S. 456, 44 S.Ct. 169, 68 L.Ed. 388 (1924). See W. C. Coleman, *The Evolution of Federal Regulation of Intrastate Rates*, 28 *Harv.L.Rev.* 34 (1914); C. W. Bunn, *Recapture of Earnings Provisions of the Transportation Act*, 32 *Yale L.Jour.* 213 (1923).

2. Considerable federal legislation based on the commerce clause has aimed at protecting interstate commerce against monopolistic practices, including such well-known statutes as the Sherman Anti-Trust Act, the Federal Trade Commission Act, and the Robinson-Patman Act. These Acts regulated not only activities and transactions in interstate commerce but also purely intrastate matters whose regulation was held valid as a necessary and proper means for protecting interstate commerce; see *Northern Securities Co. v. U. S.*, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679 (1904); *Standard Oil Co. v. U. S.*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911); *U. S. v. South-Eastern Under-Writers Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). See E. S. Corwin, *The Anti-Trust Acts and the Constitution*, 18 *Va.L.Rev.* 355 (1932).

3. Other important federal legislation was aimed at monopolistic practices in the marketing of agricultural products. These include the Packers and Stockyards Act of 1921, sustained in *Stafford v. Wallace*, 258 U.S. 495, 42 S.Ct. 397, 66 L.Ed. 735 (1922); and the Grain Futures Act, sustained in *Board of Trade of Chicago v. Olsen*, 262 U.S. 1, 43 S.Ct. 470, 67 L.Ed. 839 (1923).

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### NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN STEEL CORPORATION.

Supreme Court of the United States, 1937. 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352.

Proceeding by the National Labor Relations Board against the Jones & Laughlin Steel Corporation for enforcement of an order of the Board. The petition was denied by the Circuit Court of Appeals, 83 F.2d 998, and the petitioner brings certiorari.

Reversed and remanded.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

In a proceeding under the National Labor Relations Act of 1935, 29 U.S.C.A. § 151 et seq., the National Labor Relations Board found that the respondent, Jones & Laughlin Steel Corporation, had violated the act by engaging in unfair labor practices affecting commerce. The proceeding was instituted by the Beaver Valley Lodge No. 200, affiliated with the Amalgamated Association of Iron, Steel and Tin Workers of America, a labor organization. The unfair labor practices charged were that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in order to interfere with their self-organization. The discriminatory and coercive action alleged was the discharge of certain employees.

The National Labor Relations Board, sustaining the charge, ordered the corporation to cease and desist from such discrimination and coercion, to offer reinstatement to ten of the employees named, to make good their losses in pay, and to post for thirty days notices that the corporation would not discharge or discriminate against members, or those desiring to become members, of the labor union. As the corporation failed to comply, the Board petitioned the Circuit Court of Appeals to enforce the order. The court denied the petition holding that the order lay beyond the range of federal power. 83 F.2d 998. We granted certiorari. 299 U.S. 534, 57 S.Ct. 119, 81 L.Ed. 393.

The scheme of the National Labor Relations Act—which is too long to be quoted in full—may be briefly stated. The first section, 29 U.S.C.A. § 151, sets forth findings with respect to the injury to commerce resulting from the denial by employers of the right of employees to organize and from the refusal of employers to accept the procedure of collective bargaining.

There follows a declaration that it is the policy of the United States to eliminate these causes of obstruction to the free flow of commerce. The act then defines the terms it uses, including the terms "commerce" and "affecting commerce." Section 2, 29 U.S.C.A. § 152. It creates the National Labor Relations Board and prescribes its organization. Sections 3-6, 29 U.S.C.A. §§ 153-156. It sets forth the right of employees to self-organization and to bargain collectively through representatives of their own choosing. Section 7, 29 U.S.C.A. § 157. It defines "unfair labor practices." Section 8, 29 U.S.C.A. § 158. It lays down rules as to the representation of employees for the purpose of collective bargaining. Section 9, 29 U.S.C.A. § 159. The Board is empowered to prevent the described unfair labor practices affecting commerce and the act prescribes the procedure to that end. The Board is authorized to petition designated courts to secure the enforcement of its order. The findings of the Board as to the facts, if supported by evidence, are to be conclusive. If either party on application to the court shows that additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearings before the Board, the court may order the additional evidence to be taken. Any person aggrieved by a final order of the Board may obtain a review in the designated courts with the same procedure as in the case of an application by the Board for the enforcement of its order. Section 10, 29 U.S.C.A. § 160. The Board has broad powers of investigation. Section 11, 29 U.S.C.A. § 161. Interference with members of the Board or its agents in the performance of their duties is punishable by fine and imprisonment. Section 12, 29 U.S.C.A. § 162. Nothing in the act is to be construed to interfere with the right to strike. Section 13, 29 U.S.C.A. § 163. There is a separability clause to the effect that, if any provision of the act or its application to any person or circumstances shall be held invalid, the remainder of the act or its application to other persons or circumstances shall not be affected. Section 15, 29 U.S.C.A. § 165. The particular provisions which are involved in the instant case will be considered more in detail in the course of the discussion.

The procedure in the instant case followed the statute. The labor union filed with the Board its verified charge. The Board thereupon issued its complaint against the respondent, alleging that its action in discharging the employees in question constituted unfair labor practices affecting commerce within the meaning of section 8, subdivisions (1) and (3), and section 2, subdivisions (6) and (7), of the act. Respondent, appearing specially for the purpose of objecting to the jurisdiction of the Board, filed its answer. Respondent admitted the discharges,

but alleged that they were made because of inefficiency or violation of rules or for other good reasons and were not ascribable to union membership or activities. As an affirmative defense respondent challenged the constitutional validity of the statute and its applicability in the instant case. Notice of hearing was given and respondent appeared by counsel. The Board first took up the issue of jurisdiction and evidence was presented by both the Board and the respondent. Respondent then moved to dismiss the complaint for lack of jurisdiction and, on denial of that motion, respondent in accordance with its special appearance withdrew from further participation in the hearing. The Board received evidence upon the merits and at its close made its findings and order.

Contesting the ruling of the Board, the respondent argues (1) that the act is in reality a regulation of labor relations and not of interstate commerce; (2) that the act can have no application to the respondent's relations with its production employees because they are not subject to regulation by the federal government; and (3) that the provisions of the act violate section 2 of article 3 and the Fifth and Seventh Amendments of the Constitution of the United States, U.S.C.A.Const. art. 3, § 2; Amendments, 5, 7.

The facts as to the nature and scope of the business of the Jones & Laughlin Steel Corporation have been found by the Labor Board, and, so far as they are essential to the determination of this controversy, they are not in dispute. The Labor Board has found: The corporation is organized under the laws of Pennsylvania and has its principal office at Pittsburgh. It is engaged in the business of manufacturing iron and steel in plants situated in Pittsburgh and nearby Aliquippa, Pa. It manufactures and distributes a widely diversified line of steel and pig iron, being the fourth largest producer of steel in the United States. With its subsidiaries—nineteen in number—it is a completely integrated enterprise, owning and operating ore, coal and limestone properties, lake and river transportation facilities and terminal railroads located at its manufacturing plants. It owns or controls mines in Michigan and Minnesota. It operates four ore steamships on the Great Lakes, used in the transportation of ore to its factories. It owns coal mines in Pennsylvania. It operates towboats and steam barges used in carrying coal to its factories. It owns limestone properties in various places in Pennsylvania and West Virginia. It owns the Monongahela connecting railroad which connects the plants of the Pittsburgh works and forms an interconnection with the Pennsylvania, New York Central and Baltimore & Ohio Railroad systems. It owns the Aliquippa & Southern Railroad Company, which con-

nects the Aliquippa works with the Pittsburgh & Lake Erie, part of the New York Central system. Much of its product is shipped to its warehouses in Chicago, Detroit, Cincinnati and Memphis,—to the last two places by means of its own barges and transportation equipment. In Long Island City, New York, and in New Orleans it operates structural steel fabricating shops in connection with the warehousing of semifinished materials sent from its works. Through one of its wholly-owned subsidiaries it owns, leases, and operates stores, warehouses, and yards for the distribution of equipment and supplies for drilling and operating oil and gas mills and for pipe lines, refineries and pumping stations. It has sales offices in twenty cities in the United States and a wholly-owned subsidiary which is devoted exclusively to distributing its product in Canada. Approximately 75 per cent. of its product is shipped out of Pennsylvania.

Summarizing these operations, the Labor Board concluded that the works in Pittsburgh and Aliquippa "might be likened to the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated."

To carry on the activities of the entire steel industry, 33,000 men mine ore, 44,000 men mine coal, 4,000 men quarry limestone, 16,000 men manufacture coke, 343,000 men manufacture steel, and 83,000 men transport its product. Respondent has about 10,000 employees in its Aliquippa plant, which is located in a community of about 30,000 persons.

Respondent points to evidence that the Aliquippa plant, in which the discharged men were employed, contains complete facilities for the production of finished and semifinished iron and steel products from raw materials; that its works consist primarily of a by-product coke plant for the production of coke; blast furnaces for the production of pig iron; open hearth furnaces and Bessemer converters for the production of steel; blooming mills for the reduction of steel ingots into smaller shapes; and a number of finishing mills such as structural mills, rod mills, wire mills, and the like. In addition, there are other buildings, structures and equipment, storage yards, docks and an intraplant storage system. Respondent's operations at these works are carried on in two distinct stages, the first being the conversion of raw materials into pig iron and the second being the manufacture of semifinished and finished iron and steel products; and in both cases the operations result in substantially changing the character, utility and value of the materials wrought upon, which

is apparent from the nature and extent of the processes to which they are subjected and which respondent fully describes. Respondent also directs attention to the fact that the iron ore which is procured from mines in Minnesota and Michigan and transported to respondent's plant is stored in stock piles for future use, the amount of ore in storage varying with the season but usually being enough to maintain operations from nine to ten months; that the coal which is procured from the mines of a subsidiary located in Pennsylvania and taken to the plant at Aliquippa is there, like ore, stored for future use, approximately two to three months' supply of coal being always on hand; and that the limestone which is obtained in Pennsylvania and West Virginia is also stored in amounts usually adequate to run the blast furnaces for a few weeks. Various details of operation, transportation, and distribution are also mentioned which for the present purpose it is not necessary to detail.

Practically all the factual evidence in the case, except that which dealt with the nature of respondent's business, concerned its relations with the employees in the Aliquippa plant whose discharge was the subject of the complaint. These employees were active leaders in the labor union. Several were officers and others were leaders of particular groups. Two of the employees were motor inspectors; one was a tractor driver; three were crane operators; one was a washer in the coke plant; and three were laborers. Three other employees were mentioned in the complaint but it was withdrawn as to one of them and no evidence was heard on the action taken with respect to the other two.

While respondent criticizes the evidence and the attitude of the Board, which is described as being hostile toward employers and particularly toward those who insisted upon their constitutional rights, respondent did not take advantage of its opportunity to present evidence to refute that which was offered to show discrimination and coercion. In this situation, the record presents no ground for setting aside the order of the Board so far as the facts pertaining to the circumstances and purpose of the discharge of the employees are concerned. Upon that point it is sufficient to say that the evidence supports the findings of the Board that respondent discharged these men "because of their union activity and for the purpose of discouraging membership in the union." We turn to the questions of law which respondent urges in contesting the validity and application of the act.

*First. The Scope of the Act.*—The act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It is asserted that the references in the act to interstate and foreign

commerce are colorable at best; that the act is not a true regulation of such commerce or of matters which directly affect it, but on the contrary has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation. The argument seeks support in the broad words of the preamble (section 1) and in the sweep of the provisions of the act, and it is further insisted that its legislative history shows an essential universal purpose in the light of which its scope cannot be limited by either construction or by the application of the separability clause.

\* \* \* We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. The jurisdiction conferred upon the Board, and invoked in this instance, is found in section 10(a), 29 U.S.C.A. § 160(a), which provides:

"Sec. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158]) affecting commerce."

The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are "affecting commerce." The act specifically defines the "commerce" to which it refers (section 2(6), 29 U.S.C.A. § 152(6):

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

There can be no question that the commerce thus contemplated by the act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The act also defines the term "affecting commerce" section 2(7), 29 U.S.C.A. § 152(7):

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as

contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. See *Texas & N. O. R. Co. v. Railway & S. S. Clerks*, 281 U.S. 548, 570, 50 S.Ct. 427, 433, 434, 74 L.Ed. 1034; *Schechter Corporation v. United States*, supra, 295 U.S. 495, at pages 544, 545, 55 S.Ct. 837, 849, 79 L.Ed. 1570, 97 A.L.R. 947; *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789, decided March 29, 1937. It is the effect upon commerce, not the source of the injury, which is the criterion. *Second Employers' Liability Cases*, *Mondou v. New York, N. H. & H. R. Co.*, 223 U.S. 1, 51, 32 S.Ct. 169, 56 L.Ed. 327, 38 L.R.A., N.S., 44. Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed.

*Second. The Unfair Labor Practices in Question.*—The unfair labor practices found by the Board are those defined in section 8, subdivisions (1) and (3), 29 U.S.C.A. § 158(1, 3). These provide:

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]. \* \* \*

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Section 8, subdivision (1), refers to section 7, which is as follows:

"Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own

officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209, 42 S.Ct. 72, 78, 66 L.Ed. 189, 27 A.L.R. 360. We reiterated these views when we had under consideration the Railway Labor Act of 1926, 44 Stat. 577. Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace rather than of strife. We said that such collective action would be a mockery if representation were made futile by interference with freedom of choice. Hence the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, "instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both." *Texas & N. O. R. Co. v. Railway & S. S. Clerks*, *supra*. We have reasserted the same principle in sustaining the application of the Railway Labor Act as amended in 1934, 45 U.S.C.A. § 151 et seq. *Virginian Railway Co. v. System Federation*, No. 40, *supra*.

*Third. The Application of the Act to Employees Engaged in Production.—The Principle Involved.*—Respondent says that, whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department of respondent's enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing in itself is not commerce (citing cases).

The government distinguishes these cases. The various parts of respondent's enterprise are described as interdependent and as thus involving "a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, and thence in the form of steel products into the consuming centers of the country—a definite and well-understood course of business." It is urged that these activities constitute a "stream"

or "flow" of commerce, of which the Aliquippa manufacturing plant is the focal point, and that industrial strife at that point would cripple the entire movement. Reference is made to our decision sustaining the Packers and Stockyards Act, 7 U.S.C.A. § 181 et seq. *Stafford v. Wallace*, 258 U.S. 495, 42 S.Ct. 397, 66 L.Ed. 735, 23 A.L.R. 229. The Court found that the stockyards were but a "throat" through which the current of commerce flowed and the transactions which there occurred could not be separated from that movement. Hence the sales at the stockyards were not regarded as merely local transactions, for, while they created "a local change of title," they did not "stop the flow," but merely changed the private interests in the subject of the current. Distinguishing the cases which upheld the power of the state to impose a nondiscriminatory tax upon property which the owner intended to transport to another state, but which was not in actual transit and was held within the state subject to the disposition of the owner, the Court remarked: "The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority." *Id.*, 258 U.S. 495, at page 526, 42 S.Ct. 397, 405, 66 L.Ed. 735, 23 A.L.R. 229. See *Minnesota v. Blasius*, 290 U.S. 1, 8, 54 S.Ct. 34, 36, 78 L.Ed. 131. Applying the doctrine of *Stafford v. Wallace*, *supra*, the Court sustained the Grain Futures Act of 1922, 7 U.S.C.A. § 1 et seq., with respect to transactions on the Chicago Board of Trade, although these transactions were "not in and of themselves interstate commerce." Congress had found that they had become "a constantly recurring burden and obstruction to that commerce." *Board of Trade of City of Chicago v. Olsen*, 262 U.S. 1, 32, 43 S.Ct. 470, 476, 67 L.Ed. 839. Compare *Hill v. Wallace*, 259 U.S. 44, 69, 42 S.Ct. 453, 458, 66 L. Ed. 822. See, also, *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 50 S.Ct. 220, 74 L.Ed. 524.

Respondent contends that the instant case presents material distinctions. Respondent says that the Aliquippa plant is extensive in size and represents a large investment in buildings, machinery and equipment. The raw materials which are brought to the plant are delayed for long periods and, after being subjected to manufacturing processes "are changed substantially as to character, utility and value." The finished products which emerge "are to a large extent manufactured without reference to pre-existing orders and contracts and are entirely different from the raw materials which enter at the other end." Hence respondent argues that, "If importation and exportation in interstate commerce do not singly transfer purely local ac-

tivities into the field of congressional regulation, it should follow that their combination would not alter the local situation." *Arkadelphia Milling Co. v. St. Louis, Southwestern R. Co.*, 249 U.S. 134, 151, 39 S.Ct. 237, 63 L.Ed. 517; *Oliver Iron Co. v. Lord*, *supra*.

We do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the "stream of commerce" cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power which the government invokes in support of the present act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for its "protection or advancement" (*The Daniel Ball*, 10 Wall. 557, 564, 19 L.Ed. 999); to adopt measures "to promote its growth and insure its safety" (*County of Mobile v. Kimball*, 102 U.S. 691, 696, 697, 26 L.Ed. 238); "to foster, protect, control, and restrain." *Second Employers' Liability Cases*, *supra*, 223 U.S. 1, at page 47, 32 S.Ct. 169, 174, 56 L.Ed. 327, 38 L.R.A., N.S., 44. See *Texas & N. O. R. Co. v. Railway & S. S. Clerks*, *supra*. That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." *Second Employers' Liability Cases*, 223 U.S. 1, at page 51, 32 S.Ct. 169, 176, 56 L.Ed. 327, 38 L.R.A., N.S., 44; *Schechter Corporation v. United States*, *supra*. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *Schechter Corporation v. United States*, *supra*. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *Id.* The question is necessarily one of degree. As the Court said in *Board of Trade of City of Chicago v. Olsen*, *supra*, 262 U.S. 1, at page 37, 43 S.Ct. 470, 477, 67 L.Ed. 839, repeating what had been said in *Stafford v. Wallace*, *supra*: "Whatever amounts to more or less constant practice, and threatens to obstruct or un-

duly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and to meet it."

That intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control is demonstrated in the case of carriers who are engaged in both interstate and intrastate transportation. There federal control has been found essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. The Shreveport Case, *Houston, E. & W. T. R. Co. v. United States*, 234 U.S. 342, 351, 352, 34 S.Ct. 833, 58 L.Ed. 1341; *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 588, 42 S.Ct. 232, 237, 66 L.Ed. 371, 22 A.L.R. 1086. It is manifest that intrastate rates deal *primarily* with a local activity. But in rate making they bear such a close relation to interstate rates that effective control of the one must embrace some control over the other. *Id.* Under the Transportation Act, 1920, 49 U.S.C.A. §§ 13, 15a, Congress went so far as to authorize the Interstate Commerce Commission to establish a state-wide level of intrastate rates in order to prevent an unjust discrimination against interstate commerce. *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. R. Co.*, *supra*; *Florida v. United States*, 282 U.S. 194, 210, 211, 51 S.Ct. 119, 123, 75 L.Ed. 291. Other illustrations are found in the broad requirements of the Safety Appliance Act, 45 U.S.C.A. §§ 1-10, and the Hours of Service Act, 45 U.S.C.A. §§ 61-64. *Southern Railway Co. v. United States*, 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72; *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U.S. 612, 31 S.Ct. 621, 55 L.Ed. 878. It is said that this exercise of federal power has relation to the maintenance of adequate instrumentalities of interstate commerce. But the agency is not superior to the commerce which uses it. The protective power extends to the former because it exists as to the latter.

The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. This has been abundantly illustrated in the application of the Federal Anti-Trust Act, 15 U.S.C.A. §§ 1-7, 15 note. In the *Standard Oil and American Tobacco Cases*, *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, 34 L.R.A., N.S., 834, Ann.Cas.1912D, 734; *United States v. American Tobacco Co.*, 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663, that statute was applied to combinations of employers engaged in productive industry. Counsel for the offending corporations

strongly urged that the Sherman Act had no application because the acts complained of were not acts of interstate or foreign commerce, nor direct and immediate in their effect on interstate or foreign commerce, but primarily affected manufacturing and not commerce. 221 U.S. 1, at page 5, 31 S.Ct. 502, 55 L.Ed. 619, 34 L.R.A.,N.S., 834, Ann.Cas.1912D, 734; 221 U.S. 106, at page 125, 31 S.Ct. 632, 55 L.Ed. 663. Counsel relied upon the decision in *United States v. E. C. Knight Co.*, 156 U.S. 1, 15 S.Ct. 249, 39 L. Ed. 325. The Court stated their contention as follows: "That the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subject dehors the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the states." And the Court summarily dismissed the contention in these words: "But all the structure upon which this argument proceeds is based upon the decision in *United States v. E. C. Knight Co.*, 156 U.S. 1, 15 S.Ct. 249, 39 L.Ed. 325. The view, however, which the argument takes of that case, and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the Anti-Trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice" (citing cases). 221 U.S. 1, at pages 68, 69, 31 S. Ct. 502, 519, 55 L.Ed. 619, 34 L.R.A.,N.S., 834, Ann.Cas.1912D, 734.

Upon the same principle, the Anti-Trust Act has been applied to the conduct of employees engaged in production. *Loewe v. Lawlor*, 208 U.S. 274, 28 S.Ct. 301, 52 L.Ed. 488, 13 Ann.Cas. 815; *Coronado Coal Co. v. United Mine Workers*, supra; *Bedford Cut Stone Co. v. Stone Cutters' Association*, 274 U.S. 37, 47 S.Ct. 522, 71 L.Ed. 916, 54 A.L.R. 791. See, also, *Local 167, International Brotherhood of Teamsters v. United States*, 291 U.S. 293, 297, 54 S.Ct. 396, 398, 78 L.Ed. 804; *Schechter Corporation v. United States*, supra. The decisions dealing with the question of that application illustrate both the principle and its limitation. Thus, in the first *Coronado Case*, the Court held that mining was not interstate commerce, that the power of Congress did not extend to its regulation as such, and that it had not been shown that the activities there involved—a local strike—brought them within the provisions of the Anti-Trust Act, notwithstanding the broad terms of that statute. A similar conclusion was reached in *United Leather Workers' International Union v. Herkert & Meisel Trunk Co.*, supra, *Industrial Association v. United States*, supra, and *Levering & Garrigues v. Morrin*, 289 U.S. 103, 107, 53 S.Ct. 549, 550, 77 L.Ed. 1062. But in the first *Coronado Case* the

Court also said that "if Congress deems certain recurring practices though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint." 259 U.S. 344, at page 408, 42 S.Ct. 570, 582, 66 L.Ed. 975, 27 A.L.R. 762. And in the second Coronado Case the Court ruled that, while the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce, nevertheless when the "intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act." 268 U.S. 295, at page 310, 45 S.Ct. 551, 556, 69 L.Ed. 963. And the existence of that intent may be a necessary inference from proof of the direct and substantial effect produced by the employees' conduct. *Industrial Association v. United States*, 268 U.S. 64, at page 81, 45 S.Ct. 403, 407, 69 L.Ed. 849. What was absent from the evidence in the first Coronado Case appeared in the second and the act was accordingly applied to the mining employees.

It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. In the *Schechter Case*, *supra*, we found that the effect there was so remote as to be beyond the federal power. To find "immediacy or directness" there was to find it "almost everywhere," a result inconsistent with the maintenance of our federal system. In the *Carter Case*, *supra*, the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds,—that there was improper delegation of legislative power, and that the requirements not only went beyond any sustainable measure of protection of interstate commerce but were also inconsistent with due process. These cases are not controlling here.

*Fourth. Effects of the Unfair Labor Practice in Respondent's Enterprise.*—Giving full weight to respondent's contention with respect to a break in the complete continuity of the "stream of commerce" by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an

intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances. The opinion in the case of *Virginian Railway Co. v. System Federation No. 40*, *supra*, points out that, in the case of carriers, experience has shown that before the amendment, of 1934, of the Railway Labor Act, "when there was no dispute as to the organizations authorized to represent the employees, and when there was willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided." That, on the other hand, "a prolific source of dispute had been the maintenance by the railroads of company unions and the denial by railway management of the authority of representatives chosen by their employees." The opinion in that case also points to the large measure of success of the labor policy embodied in the Railway Labor Act. But, with respect to the appropriateness of the recognition of self-organization and representation in the promotion of peace, the question is not essentially different in the case of employees in industries of such a character that interstate commerce is put in jeopardy from the case of employees of transportation companies. And of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported!

These questions have frequently engaged the attention of Congress and have been the subject of many inquiries. The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point. The Government aptly refers to the steel strike of 1919-1920 with its far-reaching consequences. The fact that there appears to have been no major disturbance in that industry in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and to exercise its protective power to forestall. It is not necessary again to detail the facts as to respondent's enterprise. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and we have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining. \* \* \*

Our conclusion is that the order of the Board was within its competency and that the act is valid as here applied. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion. It is so ordered.

Reversed and remanded.

[Messrs. Justices McREYNOLDS, VAN DEVANTER, SUTHERLAND and BUTLER dissented.]

#### NOTE

1. The depression that began in 1929 produced a great mass of federal legislation that involved both an extension and an intensification of federal control over the national economy. In *A. L. A. Schechter Poultry Corp. v. U. S.*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935), the Court held the commerce clause not to permit the regulation of the selling practices and the labor relations of a local dealer selling goods whose interstate movement has ended; and in *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936) it held that clause not to justify federal regulation of labor relations in the coal mining industry though the bulk of the coal mined moved in the channels of interstate commerce. The reported case was the first to reverse the trend evidenced in these decisions. See F. D. G. Ribble, *The "Current of Commerce": A Note on the Commerce Clause and the National Industrial Recovery Act*, 18 Minn.L.Rev. 296 (1934).

2. Prior to the reported case the Supreme Court had passed on the validity of federal legislation regulating various phases of labor relations of employers and employees engaged in interstate commerce. It had sustained legislation regulating the hours of railroad employees engaged in the operation of interstate railroad trains, *Baltimore & O. R. Co. v. Interstate Commerce Commission*,

221 U.S. 612, 31 S.Ct. 621, 55 L.Ed. 878 (1911); the Second Employers' Liability Act Cases, 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327 (1912). The development of the judicial attitude toward legislation protecting unionism and collective bargaining in the field of interstate transportation can be traced through the following cases: *Adair v. U. S.*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436 (1908); *Texas & N. O. R. Co. v. Brotherhood of Ry & S. S. Clerks*, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034 (1930); *Virginian Ry. Co. v. System Federation No. 40, etc.*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937); *Washington, Va. & Md. Coach Co. v. Nat. Labor Relations Board*, 301 U.S. 142, 57 S.Ct. 648, 81 L.Ed. 965 (1937). Temporary wage fixing for railroad workers engaged in interstate transportation was sustained in *Wilson v. New*, 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755 (1917); see T. R. Powell, *The Supreme Court and the Adamson Law*, 65 U.Pa.L.Rev. 607 (1917). The Act establishing a compulsory retirement and pension system for the employees of interstate railroads was held invalid in *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468 (1935), but would undoubtedly be upheld today; see T. R. Powell, *Commerce, Pensions and Codes*, 49 Harv.L.Rev. 1, 193 (1935, 1936).

3. The trend of decisions has been to increase the area of local economic activities subject to the provisions of the National Labor Relations Act. The Supreme Court has refused to limit its scope by reference to the particular reasoning used in the reported case. See *N. L. R. B. v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 S.Ct. 642, 81 L.Ed. 918 (1937); *Santa Cruz Packing Co. v. N. L. R. B.*, 303 U.S. 453, 58 S.Ct. 656, 82 L.Ed. 525 (1938); *Consolidated Edison Co. v. N. L. R. B.*, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126 (1938); *N. L. R. B. v. Fainblatt*, 306 U.S. 601, 59 S.Ct. 668, 83 L.Ed. 1014 (1939); *Polish National Alliance, etc. v. N. L. R. B.*, 322 U.S. 643, 64 S.Ct. 1196, 88 L.Ed. 1509 (1944).

4. See, generally, on Congressional legislation based on the commerce clause enacted during the period since 1933, R. L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 Harv.L.Rev. 645, 883 (1946).

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### WICKARD v. FILBURN.

Supreme Court of the United States, 1942.  
317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122.

Action for injunction and for declaratory judgment by Roscoe C. Filburn against Claude R. Wickard, Secretary of Agriculture of the United States and others. From a judgment, 43 F.Supp. 1017, granting an injunction, the defendants appeal.

Mr. Justice JACKSON delivered the opinion of the Court.

The appellee filed his complaint against the Secretary of Agriculture of the United States, three members of the County Agricultural Conservation Committee for Montgomery County, Ohio, and a member of the State Agricultural Conservation Committee

for Ohio. He sought to enjoin enforcement against himself of the marketing penalty imposed by the amendment of May 26, 1941, to the Agricultural Adjustment Act of 1938, upon that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm. He also sought a declaratory judgment that the wheat marketing quota provisions of the Act as amended and applicable to him were unconstitutional because not sustainable under the Commerce Clause or consistent with the Due Process Clause of the Fifth Amendment.

The Secretary moved to dismiss the action against him for improper venue but later waived his objection and filed an answer. The other appellants moved to dismiss on the ground that they had no power or authority to enforce the wheat marketing quota provisions of the Act, and after their motion was denied they answered, reserving exceptions to the ruling on their motion to dismiss. The case was submitted for decision on the pleadings and upon a stipulation of facts.

The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding. The intended disposition of the crop here involved has not been expressly stated.

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there were established for the appellee's 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940 before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act as amended on May 26, 1941, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or \$117.11 in all. The appellee has not paid the penalty and he has not postponed or avoided it by storing the excess under regulations of the Secretary of Agriculture, or by delivering it up to the Secretary. The Committee, therefore, refused him a marketing card, which was, under the terms of Regulations promulgated by the Secretary, necessary to protect a buyer from liability to the penalty and upon its protecting lien.

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. Loans and payments to wheat farmers are authorized in stated circumstances.

The Act provides further that whenever it appears that the total supply of wheat as of the beginning of any marketing year, beginning July 1, will exceed a normal year's domestic consumption and export by more than 35 per cent, the Secretary shall so proclaim not later than May 15 prior to the beginning of such marketing year; and that during the marketing year a compulsory national marketing quota shall be in effect with respect to the marketing of wheat. Between the issuance of the proclamation and June 10, the Secretary must, however, conduct a referendum of farmers who will be subject to the quota to determine whether they favor or oppose it; and if more than one-third of the farmers voting in the referendum do oppose, the Secretary must prior to the effective date of the quota by proclamation suspend its operation. \* \* \*

Pursuant to the Act, the referendum of wheat growers was held on May 31, 1941. According to the required published statement of the Secretary of Agriculture, 81 per cent of those voting favored the marketing quota, with 19 per cent opposed. \* \* \*

It is urged that under the Commerce Clause of the Constitution, Article I, § 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed 609, 132 A.L.R. 1430, sustaining the federal power to regulate production of goods for commerce except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm. The Act includes a definition of "market" and its derivatives so that as related to wheat in addition to its conventional meaning it also means to dispose of "by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of." Hence, marketing quotas not only embrace all that may be sold without penalty but also what may be consumed on the premises. Wheat produced on excess acreage is designated as

"available for marketing" as so defined and the penalty is imposed thereon. Penalties do not depend upon whether any part of the wheat either within or without the quota is sold or intended to be sold. The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty or except it is stored as required by the Act or delivered to the Secretary of Agriculture.

Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most "indirect." In answer the Government argues that the statute regulates neither production nor consumption, but only marketing; and, in the alternative, that if the Act does go beyond the regulation of marketing it is sustainable as a "necessary and proper" implementation of the power of Congress over interstate commerce.

The Government's concern lest the Act be held to be a regulation of production or consumption rather than of marketing is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as "production," "manufacturing," and "mining" are strictly "local" and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as matter of law, only "indirect." Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof. We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. *Gibbons v. Ogden*, 9 Wheat. 1, 194, 195, 6 L.Ed. 23. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes. 9 Wheat at page 197, 6 L.Ed. 23.

For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period there was perhaps little occasion for the affirmative exercise of the commerce power, and the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision the point of reference instead of being what was "necessary and proper" to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood. Certain activities such as "production," "manufacturing," and "mining" were occasionally said to be within the province of state governments and beyond the power of Congress under the Commerce Clause.

It was not until 1887 with the enactment of the Interstate Commerce Act that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder.

When it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress. *United States v. E. C. Knight Co.*, 156 U.S. 1, 15 S.Ct. 249, 39 L.Ed. 325. These earlier pronouncements also played an important part in several of the five cases in which this Court later held that Acts of Congress under the Commerce Clause were in excess of its power.

Even while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*, *supra*.

Not long after the decision of *United States v. E. C. Knight Co.*, *supra*, Mr. Justice Holmes, in sustaining the exercise of national power over intrastate activity, stated for the Court that "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U.S. 375, 398, 25 S.Ct. 276, 280, 49 L.Ed. 518. It was soon demonstrated that the effects of many kinds of intra-

state activity upon interstate commerce were such as to make them a proper subject of federal regulation. In some cases sustaining the exercise of federal power over intrastate matters the term "direct" was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with "substantial" or "material;" and in others it was not used at all. Of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause.

In the *Shreveport Rate Cases* (*Houston, E. & W. T. R. Co. v. United States*), 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341, the Court held that railroad rates of an admittedly intrastate character and fixed by authority of the state might, nevertheless, be revised by the Federal Government because of the economic effects which they had upon interstate commerce. The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of "matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of the conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." 234 U.S. at page 351, 34 S.Ct. at page 836, 58 L.Ed. 1341.

The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause exemplified by this statement has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be "production" nor can consideration of its economic effects be foreclosed by calling them "indirect." The present Chief Justice has said in summary of the present state of the law: "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. \* \* \* The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. \* \* \* It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere

with or obstruct the exercise of the granted power." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726.

Whether the subject of the regulation in question was "production," "consumption," or "marketing" is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of Congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

The parties have stipulated a summary of the economics of the wheat industry. Commerce among the states in wheat is large and important. Although wheat is raised in every state but one, production in most states is not equal to consumption. Sixteen states on average have had a surplus of wheat above their own requirements for feed, seed, and food. Thirty-two states and the District of Columbia, where production has been below consumption, have looked to these surplus-producing states for their supply as well as for wheat for export and carryover.

The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 per cent of total production, while during the 1920's they averaged more than 25 per cent. The decline in the export trade has left a large surplus in production which in connection with an abnormally large supply of wheat and other grains in recent years caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion.

Many countries, both importing and exporting, have sought to modify the impact of the world market conditions on their own economy. Importing countries have taken measures to stimulate production and self-sufficiency. The four large exporting countries of Argentina, Australia, Canada, and the United States have all undertaken various programs for the relief of growers.

Such measures have been designed in part at least to protect the domestic price received by producers. Such plans have generally evolved towards control by the central government.

In the absence of regulation the price of wheat in the United States would be much affected by world conditions. During 1941 producers who cooperated with the Agricultural Adjustment program received an average price on the farm of about \$1.16 a bushel as compared with the world market price of 40 cents a bushel.

Differences in farming conditions, however, make these benefits mean different things to different wheat growers. There are several large areas of specialization in wheat, and the concentration on this crop reaches 27 percent of the crop land, and the average harvest runs as high as 155 acres. Except for some use of wheat as stock feed and for seed, the practice is to sell the crop for cash. Wheat from such areas constitutes the bulk of the interstate commerce therein.

On the other hand, in some New England states less than one percent of the crop land is devoted to wheat, and the average harvest is less than five acres per farm. In 1940 the average percentage of the total wheat production that was sold in each state as measured by value ranged from 29 per cent thereof in Wisconsin to 90 per cent in Washington. Except in regions of large-scale production, wheat is usually grown in rotation with other crops; for a nurse crop for grass seeding; and as a cover crop to prevent soil erosion and leaching. Some is sold, some kept for seed, and a percentage of the total production much larger than in areas of specialization is consumed on the farm and grown for such purpose. Such farmers, while growing some wheat, may even find the balance of their interest on the consumer's side.

The effect of consumption of homegrown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may be trivial by itself is not enough to remove him from the needs. That appellee's own contribution to the demand for wheat

may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. \* \* \*

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

It is said, however, that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers. It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do. \* \* \*

Reversed.

#### NOTE

1. The use of the federal taxing power to control agricultural production as a means for alleviating the consequences of the depression in agriculture was held invalid in *U. S. v. Butler*; see page 218.

2. The reported case was the culmination of a line of cases involving the constitutionality of federal legislation, based on the commerce clause, enacted to deal with the national agricultural problem. In *U. S. v. Rock Royal Co-Op. Inc.*, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1939), the commerce power was held to permit federal price control over milk shipped in interstate commerce. This includes power to subject to like control milk marketed in the state of its production but which competes with milk marketed through the channels of interstate commerce, *U. S. v. Wrightwood Dairy Co.*, 315 U.S. 110, 62 S.Ct. 523, 86 L.Ed. 726 (1942). Federal control of production through establishing marketing quotas in interstate commerce was first sustained in *Mulford v. Smith*, 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092 (1939).

3. For a case sustaining federal price control over coal marketed in interstate commerce, see *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940).

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### UNITED STATES v. DARBY.

Supreme Court of the United States, 1941.  
312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609.

Mr. Justice STONE delivered the opinion of the Court.

The two principal questions raised by the record in this case are, first, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, second, whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. A subsidiary question is whether in connection with such prohibitions Congress can require the employer subject to them to keep records showing the hours worked each day and week by each of his employees including those engaged "in the production and manufacture of goods to wit, lumber, for 'interstate commerce.'"

Appellee demurred to an indictment found in the district court for southern Georgia charging him with violation of § 15(a) (1) (2) and (5) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. § 201 et seq., 29 U.S.C.A. § 201 et seq. The district court sustained the demurrer and quashed the indictment and the case comes here on direct appeal under § 238 of the Judicial Code as amended, 28 U.S.C. § 345, 28 U.S.C.A. § 345, and § 682, Title 18 U.S.C., 34 Stat. 1246, 18 U.S.C.A. § 682, which authorizes an appeal to this Court when the judgment sustaining the demurrer "is based upon the invalidity, or construction of the statute upon which the indictment is founded".

The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy in § 2(a) of the Act, and the reports of Congressional committees proposing the legislation, S.Rept.No.884, 75th Cong. 1st Sess.; H.Rept.No.1452, 75th Cong. 1st Sess.; H.Rept.No.2182, 75th Cong. 3d Sess., Conference Report, H.Rept.No.2738, 75th Cong. 3d Sess., is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. The Act also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act or within an industry in accordance with specified standards, by an administrator acting in collaboration with "Industry Committees" appointed by him.

Section 15 of the statute prohibits certain specified acts and § 16(a) punishes willful violation of it by a fine of not more than \$10,000 and punishes each conviction after the first by imprisonment of not more than six months or by the specified fine or both. Section 15(a) (1) makes unlawful the shipment in interstate commerce of any goods "in the production of which any employee was employed in violation of section 6[206] or section 7[207]", which provide, among other things, that during the first year of operation of the Act a minimum wage of 25 cents per hour shall be paid to employees "engaged in [interstate] commerce or in the production of goods for [interstate] commerce," § 6, and that the maximum hours of employment for employees "engaged in commerce or in the production of goods for commerce" without increased compensation for overtime, shall be forty-four hours a week. § 7.

Section 15(a) (2) makes it unlawful to violate the provisions of §§ 6 and 7 including the minimum wage and maximum hour requirements just mentioned for employees engaged in production of goods for commerce. Section 15(a) (5) makes it unlawful for an employer subject to the Act to violate § 11(c) which requires him to keep such records of the persons employed by him and of their wages and hours of employment as the administrator shall prescribe by regulation or order.

The indictment charges that appellee is engaged, in the state of Georgia, in the business of acquiring raw materials, which he manufactures into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state, and that he does in fact so ship a large part of the lumber so produced. There are numerous counts charging appellee with the shipment in interstate commerce from Georgia to points outside the state of lumber in the production of which, for interstate commerce, appellee has employed workmen at less than the prescribed minimum wage or more than the prescribed maximum hours without payment to them of any wage for overtime. Other counts charge the employment by appellee of workmen in the production of lumber for interstate commerce at wages of less than 25 cents an hour or for more than the maximum hours per week without payment to them of the prescribed overtime wage. Still another count charges appellee with failure to keep records showing the hours worked each day a week by each of his employees as required by § 11(c) and the regulation of the administrator, Title 29, Ch. 5, Code of Federal Regulations, Part 516, and also that appellee unlawfully failed to keep such records of employees engaged "in the production and manufacture of goods, to-wit lumber, for interstate commerce".

The demurrer, so far as now relevant to the appeal, challenged the validity of the Fair Labor Standards Act under the Commerce Clause, Art. 1, § 8, cl. 3, and the Fifth and Tenth Amendments. The district court quashed the indictment in its entirety upon the broad grounds that the Act, which it interpreted as a regulation of manufacture within the states, is unconstitutional. It declared that manufacture is not interstate commerce and that the regulation by the Fair Labor Standards Act of wages and hours of employment of those engaged in the manufacture of goods which it is intended at the time of production "may or will be" after production "sold in interstate commerce in part or in whole" is not within the congressional power to regulate interstate commerce.

The effect of the court's decision and judgment are thus to deny the power of Congress to prohibit shipment in interstate commerce of lumber produced for interstate commerce under the proscribed substandard labor conditions of wages and hours, its power to penalize the employer for his failure to conform to the wage and hour provisions in the case of employees engaged in the production of lumber which he intends thereafter to ship in interstate commerce in part or in whole according to the normal course of his business and its power to compel him to keep records of hours of employment as required by the statute and the regulations of the administrator.

The case comes here on assignments by the Government that the district court erred insofar as it held that Congress was without constitutional power to penalize the acts set forth in the indictment, and appellees seek to sustain the decision below on the grounds that the prohibition by Congress of those Acts is unauthorized by the commerce clause and is prohibited by the Fifth Amendment. The appeals statute limits our jurisdiction on this appeal to a review of the determination of the district court so far only as it is based on the validity or construction of the statute. *United States v. Borden Co.*, 308 U.S. 188, 193, 195, 60 S.Ct. 182, 185, 186, 84 L.Ed. 181, and cases cited. Hence we accept the district court's interpretation of the indictment and confine our decision to the validity and construction of the statute.

*The prohibition of shipment of the proscribed goods in interstate commerce.* Section 15(a) (1) prohibits, and the indictment charges, the shipment in interstate commerce, of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to the requirements of the Act. Since this section is not violated unless the commodity shipped has been produced under labor conditions prohibited by § 6 and § 7, the only question arising under the commerce clause with respect to such shipments is whether Congress has the constitutional power to prohibit them.

While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed". *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L.Ed. 23. It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. \* \* \* It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles, *Lottery Case*, supra; *Hipolite Egg Co. v. United States*, 220 U.S. 45, 31 S.Ct. 364, 55 L.Ed. 364; cf. *Hoke v. United States*, supra; stolen articles, *Brooks v. United States*, 267 U.S. 432, 45 S.Ct. 345, 69 L.Ed. 699, 37 A.L.R. 1407; kidnapped persons, *Gooch v. United States*, 297 U.S. 124, 56 S.Ct. 395, 80 L.Ed. 522, and articles such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination. *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270.

But it is said that the present prohibition falls within the scope of none of these categories; that while the prohibition is nominally a regulation of the commerce its motive or purpose is regula-

tion of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states and upon which Georgia and some of the states of destination have placed no restriction; that the effect of the present statute is not to exclude the prescribed articles from interstate commerce in aid of state regulation as in *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, supra, but instead under the guise of a regulation of interstate commerce, it undertakes to regulate wages and hours within the state contrary to the policy of the state which has elected to leave them unregulated.

The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed by the constitution." *Gibbons v. Ogden*, supra, 9 Wheat. 196, 6 L.Ed. 23. That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, supra. Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use. *Reid v. Colorado*, supra; *Lottery Case*, supra; *Hipolite Egg Co. v. United States*, supra; *Hoke v. United States*, supra.

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.

\* \* \*

The motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. *McCray v. United States*, 195 U.S. 27, 24 S.Ct. 769, 49 L.Ed. 78, 1 Ann.Cas. 561; *Sonzinsky v. United States*, 300 U.S. 506, 513, 57 S.Ct. 554, 555, 81 L.Ed. 772, and

cases cited. "The judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged power". *Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L.Ed. 482. Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

In the more than a century which has elapsed since the decision of *Gibbons v. Ogden*, these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101, 3 A.L.R. 649, Ann.Cas. 1918E, 724. In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

*Hammer v. Dagenhart* has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. *Brooks v. United States*, *supra*; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, *supra*; *Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936, 115 A.L.R. 105; *Mulford v. Smith*, 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092. The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. *Reid v. Colorado*, *supra*; *Lottery Case*, *supra*; *Hipolite Egg Co. v. United*

States, *supra*; *Seven Cases v. United States*, *supra*, 239 U.S. 514, 36 S.Ct. 191, 60 L.Ed. 411; *Hamilton v. Kentucky Distilleries & Warehouse Co.*, *supra*, 251 U.S. 156, 40 S.Ct. 108, 64 L.Ed. 194; *United States v. Carolene Products Co.*, *supra*, 304 U.S. 147, 58 S.Ct. 780, 82 L.Ed. 1234. And finally we have declared "The authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce". *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 569, 59 S.Ct. 993, 1011, 83 L.Ed. 1446.

The conclusion is inescapable that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.

*Validity of the wage and hour requirements.* Section 15(a) (2) and §§ 6 and 7 require employers to conform to the wage and hour provisions with respect to all employees engaged in the production of goods for interstate commerce. As appellee's employees are not alleged to be "engaged in interstate commerce" the validity of the prohibition turns on the question whether the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.

To answer this question we must at the outset determine whether the particular acts charged in the counts which are laid under § 15(a) (2) as they were construed below, constitute "production for commerce" within the meaning of the statute. As the Government seeks to apply the statute in the indictment, and as the court below construed the phrase "produced for interstate commerce", it embraces at least the case where an employer engaged, as are appellees, in the manufacture and shipment of goods in filling orders of extrastate customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be selected for shipment to those customers.

Without attempting to define the precise limits of the phrase, we think the acts alleged in the indictment are within the sweep of the statute. The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it. Congress was not unaware that most manufacturing businesses shipping their product in intrastate commerce make it in their shops without reference to

its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce. Cf. *United States v. New York Central R. Co.*, 272 U.S. 457, 464, 47 S.Ct. 130, 132, 71 L.Ed. 350.

The recognized need of drafting a workable statute and the well known circumstances in which it was to be applied are persuasive of the conclusion, which the legislative history supports, S.Rept.No. 884, 75th Cong. 1st Sess., pp. 7 and 8; H.Rept.No. 2738, 75th Cong. 3d Sess., p. 17, that the "production for commerce" intended includes at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce.

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. \* \* \*

While this Court has many times found state regulation of interstate commerce, when uniformity of its regulation is of national concern, to be incompatible with the Commerce Clause even though Congress has not legislated on the subject, the Court has never implied such restraint on state control over matters intrastate not deemed to be regulations of interstate commerce or its instrumentalities even though they affect the commerce. *Minnesota Rate Cases*, 230 U.S. 352, 398, 410 et seq., 33 S.Ct. 729, 739, 744, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas.1916A, 18, and cases cited. In the absence of Congressional legislation on the subject state laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce. *Kidd v. Pearson*, 128 U.S. 1, 9 S.Ct. 6, 32 L.Ed. 346; *Bacon v. Illinois*, 227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615; *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237; *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929.

But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. See *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U.S. 453, 466, 58 S.Ct. 656, 660, 82 L.Ed. 954. A recent example is the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., for the regulation of employer and employee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce. See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 38, 40, 57 S.Ct. 615, 625, 81 L.Ed. 893, 108 A.L.R. 1352; *National Labor Relations Board v. Fainblatt*, 306 U.S. 601, 604, 59 S.Ct. 668, 670, 83 L.Ed. 1014, and cases cited. But long before the adoption of the National Labor Relations Act, this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.

In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the *Sherman Act*, 15 U.S.C.A. §§ 1-7, 15 note. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the *Interstate Commerce Act*, 49 U.S.C.A. § 1 et seq., and the *National Labor Relations Act* or whether they come within the statutory definition of the prohibited Act as in the *Federal Trade Commission Act*, 15 U.S.C.A. § 41 et seq. And sometimes Congress itself has said that a particular activity affects the commerce as it did in the present act, the *Safety Appliance Act*, 15 U.S.C.A. § 1 et seq., and the *Railway Labor Act*, 45 U.S.C.A. § 181 et seq. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power. See *United States v. Ferger*, *supra*; *Virginian R. Co. v. System Federation*, 300 U.S. 515, 553, 57 S.Ct. 592, 602, 81 L.Ed. 789.

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not

themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. \* \* \* A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. *Shreveport Case*, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341; *Wisconsin Railroad Comm. v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 371, 22 A.L.R. 1086; *United States v. New York Central R. R. Co.*, *supra*, 272 U.S. 464, 47 S.Ct. 132, 71 L.Ed. 350; *Curran v. Wallace*, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441; *Mulford v. Smith*, *supra*. Similarly Congress may require inspection and preventive treatment of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the cattle without the treatment. *Thornton v. United States*, 271 U.S. 414, 46 S.Ct. 585, 70 L.Ed. 1013. It may prohibit the removal, at destination, of labels required by the Pure Food & Drugs Act, 21 U.S.C.A. § 1 *et seq.*, to be affixed to articles transported in interstate commerce. *McDermott v. Wisconsin*, 228 U.S. 115, 33 S.Ct. 431, 57 L.Ed. 754, 47 L.R.A.,N.S., 984, Ann.Cas.1915A, 39. And we have recently held that Congress in the exercise of its power to require inspection and grading of tobacco shipped in interstate commerce may compel such inspection and grading of all tobacco sold at local auction rooms from which a substantial part but not all of the tobacco sold is shipped in interstate commerce. *Curran v. Wallace*, *supra*, 306 U.S. 11, 59 S.Ct. 385, 83 L.Ed. 441, and see to the like effect *United States v. Rock Royal Co-Op.*, *supra*, 307 U.S. 568, 59 S.Ct. 1010, 83 L.Ed. 1446, note 37.

We think also that § 15(a) (2), now under consideration, is sustainable independently of § 15(a) (1), which prohibits shipment or transportation of the proscribed goods. As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as "unfair", as the Clayton Act, 38 Stat. 730, has condemned other "unfair methods of competition" made effective through interstate commerce. See *Van Camp & Sons v. American Can Co.*, 278 U.S. 245, 49 S.Ct.

112, 73 L.Ed. 311, 60 A.L.R. 1060; *Federal Trade Comm. v. R. F. Keppel & Bro.*, 291 U.S. 304, 54 S.Ct. 423, 78 L.Ed. 814.

The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce. \* \* \*

The means adopted by § 15(a) (2) for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power. See *Currin v. Wallace*, *supra*, 306 U.S. 11, 59 S.Ct. 385, 83 L.Ed. 441. Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. See H.Rept.No. 2182, 75th Cong. 1st Sess., p. 7. The legislation aimed at a whole embraces all its parts. Cf. *National Labor Relations Board v. Fainblatt*, *supra*, 306 U.S. 606, 59 S.Ct. 671, 83 L.Ed. 1014.

So far as *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160, is inconsistent with this conclusion, its doctrine is limited in principle by the decisions under the Sherman Act and the National Labor Relations Act, which we have cited and which we follow. See, also, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263; *Currin v. Wallace*, *supra*; *Mulford v. Smith*, *supra*; *United States v. Rock Royal Co-Op.*, *supra*; *Clover Fork Coal Co. v. National Labor Relations Board*, 6 Cir., 97 F.2d 331; *National Labor Relations Board v. Crowe Coal Co.*, 8 Cir., 104 F.2d 633; *National Labor Relations Board v. Good Coal Co.*, 6 Cir., 110 F.2d 501.

Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people". The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national govern-

ment might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. See e.g., II Elliot's Debates, 123, 131; III id. 450, 464, 600; IV id. 140, 149; I Annals of Congress, 432, 761, 767-768; Story, Commentaries on the Constitution, secs. 1907, 1908.

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. \* \* \* Whatever doubts may have arisen of the soundness of that conclusion they have been put at rest by the decisions under the Sherman Act and the National Labor Relations Act which we have cited. See, also, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 330, 331, 56 S.Ct. 466, 475, 80 L.Ed. 688; *Wright v. Union Central Ins. Co.*, 304 U.S. 502, 516, 58 S.Ct. 1025, 1033, 82 L.Ed. 1490. \* \* \*

We have considered, but find it unnecessary to discuss other contentions.

Reversed.

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#### NOTE

1. Prior to the reported case the law as to how far the power to regulate interstate commerce included the power of prohibiting it was in a rather confused condition. It had been held valid to prohibit the interstate transportation of lottery tickets, *Champion v. Ames*, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903); of intoxicating liquors into states that had adopted the policy of prohibition with respect thereto, *Clark Distilling Co. v. Western Md. R. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326 (1917); *U. S. v. Hill*, 248 U.S. 420, 39 S.Ct. 143, 63 L.Ed. 337 (1919); of stolen automobiles, *Brooks v. U. S.*, 267 U.S. 432, 45 S.Ct. 345, 69 L.Ed. 699 (1925); and of kidnapped persons, *Bailey v. U. S.*, 74 F.2d 451 (C.C.A.Okl.1934). The leading case invalidating an Act of Congress prohibiting interstate transportation was *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101 (1918). The opinion in *Brooks v. U. S.*, supra, attempts to rationalize prior decisions, including *Hammer v. Dagenhart*.

2. See, generally, on the power of Congress to prohibit interstate commerce, E. S. Corwin, *Congress' Power to Prohibit Commerce—A Crucial Constitutional Issue*, 18 Cornell L.Quar. 477 (1933); R. E. Cushman, *National Police Power under the Commerce Clause*, 3 Minn.L.Rev. 289, 381, 452 (1919); Note, *The Feasibility of State Control as a Test of the Scope of the Federal "Police Power,"* 29 Col.L.Rev. 321 (1929).

3. The expanded power to prohibit interstate commerce possible under the doctrine of the reported case is illustrated by the deci-

sions sustaining various provisions of the Public Utility Holding Company Act of 1935; *North American Co. v. S. E. C.*, 327 U.S. 686, 66 S.Ct. 785, 90 L.Ed. 945 (1946); *American Pr. & Lt. Co. v. S. E. C.*, 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946).

4. Congressional regulation of wages was first sustained as a temporary measure, necessitated by the national emergency resulting from a threatened nation-wide strike of railway operating employees, in *Wilson v. New*, 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755 (1917). The extent of the change in judicial construction of the commerce power is evident from a comparison of the opinions in that case with that in the reported case. The Supreme Court has given the Fair Labor Standards Act a liberal construction; see *D. A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 S.Ct. 925, 90 L.Ed. 1114 (1946).

5. For discussion of other problems of the scope of federal commerce power, see *M. M. Watkins, Federal Incorporation*, 17 Mich. L.Rev. 64, 145 (1918); *J. W. Brabner-Smith, The Commerce Clause and the New Federal "Extradition"—Statute*, 29 Ill.L.Rev. 355 (1934); *Comment, Constitutional Law—A Federal Commercial Code—Some Possibilities Under the Constitution*, 45 Mich.L.Rev. 1021 (1947); *T. R. Powell, Insurance as Commerce in Constitution and Statute*, 57 Harv.L.Rev. 937 (1944).

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### ASHWANDER v. TENNESSEE VALLEY AUTHORITY.

Supreme Court of the United States, 1936. 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

On January 4, 1934, the Tennessee Valley Authority, an agency of the federal government, entered into a contract with the Alabama Power Company, providing (1) for the purchase by the Authority from the Power Company of certain transmission lines, substations, and auxiliary properties for \$1,000,000; (2) for the purchase by the Authority from the Power Company of certain real property for \$150,000; (3) for an interchange of hydroelectric energy, and, in addition, for the sale by the Authority to the Power Company of its "surplus power," on stated terms; and (4) for mutual restrictions as to the areas to be served in the sale of power. The contract was amended and supplemented in minor particulars on February 13, and May 24, 1934.

The Alabama Power Company is a corporation organized under the laws of Alabama, and is engaged in the generation of electric energy and its distribution generally throughout that state; its lines reaching 66 counties. The transmission lines to be purchased by the Authority extend from Wilson Dam, at the Muscle Shoals plant owned by the United States on the Tennessee river in northern Alabama, into seven counties in that state, within a radius of about 50 miles. These lines serve a population of ap-

proximately 190,000, including about 10,000 individual customers, or about one-tenth of the total number served directly by the Power Company. The real property to be acquired by the Authority (apart from the transmission lines above mentioned and related properties) is adjacent to the area known as the "Joe Wheeler dam site," upon which the Authority is constructing the Wheeler Dam.

The contract of January 4, 1934, also provided for co-operation between the Alabama Power Company and the Electric Home & Farm Authority, Inc., a subsidiary of the Tennessee Valley Authority, to promote the sale of electrical appliances, and to that end the Power Company, on May 21, 1934, entered into an agency contract with the Electric Home & Farm Authority, Inc. It is not necessary to detail or discuss the proceedings in relation to that transaction, as it is understood that the latter corporation has been dissolved.

There was a further agreement on August 9, 1934, by which the Alabama Power Company gave an option to the Tennessee Valley Authority to acquire urban distribution systems which had been retained by the Power Company in municipalities within the area served by the transmission lines above mentioned. It appears that this option has not been exercised and that the agreement has been terminated.

Plaintiffs are holders of preferred stock of the Alabama Power Company. Conceiving the contract with the Tennessee Valley Authority to be injurious to the corporate interests and also invalid, because beyond the constitutional power of the federal government, they submitted their protest to the board of directors of the Power Company and demanded that steps should be taken to have the contract annulled. The board refused, and the Commonwealth & Southern Corporation, the holder of all the common stock of the Power Company, declined to call a meeting of the stockholders to take action. As the protest was unavailing, plaintiffs brought this suit to have the invalidity of the contract determined and its performance enjoined. Going beyond that particular challenge, and setting forth the pronouncements, policies, and programs of the Authority, plaintiffs sought a decree restraining these activities as repugnant to the Constitution, and also asked a general declaratory decree with respect to the rights of the Authority in various relations.

The defendants, including the Authority and its directors, the Power Company and its mortgage trustee, and the municipalities within the described area, filed answers, and the case was heard upon evidence. The District Court made elaborate findings and entered a final decree annulling the contract of January 4, 1934, and enjoining the transfer of the transmission lines and auxiliary

properties. 9 F.Supp. 965. The court also enjoined the defendant municipalities from making or performing any contracts with the Authority for the purchase of power and from accepting or expending any funds received from the Authority or the Public Works Administration for the purpose of constructing a public distribution system to distribute power which the Authority supplied. The court gave no consideration to plaintiffs' request for a general declaratory decree.

The Authority, its directors, and the city of Florence appealed from the decree and the case was severed as to the other defendants. Plaintiffs took a cross-appeal.

The Circuit Court of Appeals limited its discussion to the precise issue with respect to the effect and validity of the contract of January 4, 1934. The District Court had found that the electric energy required for the territory served by the transmission lines to be purchased under that contract is available at Wilson Dam without the necessity for any interconnection with any other dam or power plant. The Circuit Court of Appeals accordingly considered the constitutional authority for the construction of Wilson Dam and for the disposition of the electric energy there created. In the view that the Wilson Dam had been constructed in the exercise of the war and commerce powers of the Congress and that the electric energy there available was the property of the United States and subject to its disposition, the Circuit Court of Appeals decided that the decree of the District Court was erroneous and should be reversed. The court also held that plaintiffs should take nothing by their cross-appeal. 78 F.2d 578. On plaintiffs' application we granted writs of certiorari. 296 U.S. 562, 56 S.Ct. 145, 80 L.Ed. 396. \* \* \*

*Third. The Constitutional Authority for the Construction of the Wilson Dam.* The Congress may not, "under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government." Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. 316, 423, 4 L.Ed. 579; *Linder v. United States*, 268 U.S. 5, 15, 17, 45 S.Ct. 446, 69 L.Ed. 819, 39 A.L.R. 229. The government's argument recognizes this essential limitation. The government's contention is that the Wilson Dam was constructed, and the power plant connected with it was installed, in the exercise by the Congress of its war and commerce powers (U.S.C.A.Const. art. 1, § 8, cls. 3, 11); that is, for the purposes of national defense and the improvement of navigation.

Wilson Dam is described as a concrete monolith one hundred feet high and almost a mile long, containing two locks for navigation and eight installed generators. Construction was begun in 1917 and completed in 1926. Authority for its construction is found in section 124 of the National Defense Act of June 3. 1916.

50 U.S.C.A. § 79. It authorized the President to cause an investigation to be made in order to determine "the best, cheapest, and most available means for the production of nitrates and other products for munitions of war"; to designate for the exclusive use of the United States "such site or sites, upon any navigable or non-navigable river or rivers or upon the public lands, as in his opinion will be necessary for carrying out the purposes of this Act [section]"; and "to construct, maintain, and operate" on any such site "dams, locks, improvements to navigation, power houses, and other plants and equipment or other means than water power as in his judgment is the best and cheapest, necessary or convenient for the generation of electrical or other power and for the production of nitrates or other products needed for munitions of war and useful in the manufacture of fertilizers and other useful products." The President was authorized to lease or acquire by condemnation or otherwise such lands as might be necessary, and there was further provision that "the products of such plants shall be used by the President for military and naval purposes to the extent that he may deem necessary, and any surplus which he shall determine is not required shall be sold and disposed of by him under such regulations as he may prescribe." *Id.*

We may take judicial notice of the international situation at the time the act of 1916 was passed, and it cannot be successfully disputed that the Wilson Dam and its auxiliary plants, including the hydroelectric power plant, are, and were intended to be, adapted to the purposes of national defense. While the District Court found that there is no intention to use the nitrate plants or the hydroelectric units installed at Wilson Dam for the production of war materials in time of peace, "the maintenance of said properties in operating condition and the assurance of an abundant supply of electric energy in the event of war, constitute national defense assets." This finding has ample support.

The act of 1916 also had in view "improvements to navigation." Commerce includes navigation. "All America understands, and has uniformly understood," said Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 190, 6 L.Ed. 23, "the word 'commerce,' to comprehend navigation." The power to regulate interstate commerce embraces the power to keep the navigable rivers of the United States free from obstructions to navigation and to remove such obstructions when they exist. "For these purposes," said the Court in *Gilman v. Philadelphia*, 3 Wall. 713, 725, 18 L.Ed. 96, "Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England." See, also, *Philadelphia Company v. Stimson*, 223 U.S. 605, 634, 32 S.Ct. 340, 56 L.Ed. 570.

The Tennessee river is a navigable stream, although there are obstructions at various points because of shoals, reefs, and rapids. The improvement of navigation on this river has been a matter of national concern for over a century. Recommendation that provision be made for navigation around Muscle Shoals was made by the Secretary of War, John C. Calhoun, in his report transmitted to the Congress by President Monroe in 1824, and, from 1852, the Congress has repeatedly authorized projects to develop navigation on that and other portions of the river, both by open channel improvements and by canalization. The Wilson Dam project, adopted in 1918, gave a nine-foot slack water development, for fifteen miles above Florence, over the Muscle Shoals rapids, and, as the District Court found, "flooded out the then existing canal and locks which were inadequate." The District Court also found that a "high dam of this type was the only feasible means of eliminating this most serious obstruction to navigation." By the act of 1930, after a protracted study by the Corps of Engineers of the United States Army, the Congress adopted a project for a permanent improvement of the main stream "for a navigable depth of nine feet." 46 Stat. 918, 927, 928.

While, in its present condition, the Tennessee river is not adequately improved for commercial navigation, and traffic is small, we are not at liberty to conclude either that the river is not susceptible of development as an important waterway, or that Congress has not undertaken that development, or that the construction of the Wilson Dam was not an appropriate means to accomplish a legitimate end.

The Wilson Dam and its power plant must be taken to have been constructed in the exercise of the constitutional functions of the federal government.

*Fourth. The Constitutional Authority to Dispose of Electric Energy Generated at the Wilson Dam.* The government acquired full title to the dam site, with all riparian rights. The power of falling water was an inevitable incident of the construction of the dam. That water power came into the exclusive control of the federal government. The mechanical energy was convertible into electric energy, and the water power, the right to convert it into electric energy, and the electric energy thus produced constitute property belonging to the United States. See *Green Bay & M. Canal Company v. Patten Paper Company*, 172 U.S. 58, 80, 19 S.Ct. 97, 101, 43 L.Ed. 364; *United States v. Chandler-Dunbar Water Power Company*, 229 U.S. 53, 72, 73, 33 S.Ct. 667, 57 L.Ed. 1063; *Utah Power & Light Co. v. Pfof*, 286 U.S. 165, 170, 52 S.Ct. 548, 76 L.Ed. 1038.

Authority to dispose of property constitutionally acquired by the United States is expressly granted to the Congress by section 3 of article 4 of the Constitution, U.S.C.A.Const. art. 4, § 3. This section provides:

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

To the extent that the power of disposition is thus expressly conferred, it is manifest that the Tenth Amendment, U.S.C.A. Const. amend. 10, is not applicable. And the Ninth Amendment, U.S.C.A.Const. amend. 9 (which petitioners also invoke), in insuring the maintenance of the rights retained by the people, does not withdraw the rights which are expressly granted to the federal government. The question is as to the scope of the grant and whether there are inherent limitations which render invalid the disposition of property with which we are now concerned.

\* \* \*

Affirmed.

[Mr. Justice BRANDEIS gave a concurring opinion. Mr. Justice McREYNOLDS rendered a separate opinion.]

#### NOTE

1. For other cases discussing the extent of federal control over the navigable waters of the United States under the commerce power, see *U. S. v. Appalachian Electric Power Co.*, 311 U.S. 377, 61 S. Ct. 291, 85 L.Ed. 243 (1940); *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508, 61 S.Ct. 1050, 85 L.Ed. 1487 (1941). See for discussions of the Federal power program E. F. Albertsworth, *Constitutional Issues in the Federal Power Program*, 29 Ill.L.Rev. 833 (1935); G. B. Clothier, *The Federal Water Power Program*, 84 U.Pa.L.Rev. 1 (1935).

2. Congress also exercises considerable control over the navigable waters of the United States, irrespective of whether or not the matter regulated constitutes interstate or foreign commerce or matters related to these, under the provisions of U.S.Const., Art. 3, Sec. 2, which includes in federal judicial power all cases of admiralty and maritime jurisdiction. For cases discussing this problem see *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917); *London Guaranty & Accident Co. v. Industrial Accident Commission of California*, 279 U.S. 109, 49 S.Ct. 296, 73 L.Ed. 632 (1928); *Davis v. Dept. of Labor and Industries*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942); *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 63 S.Ct. 1067, 87 L.Ed. 1416 (1943). See S. Morrison, *Workmen's Compensation and Maritime Law*, 38 Yale L.Jour. 472 (1929); S. Morrison, *The Constitutionality of the Ship Mortgage Act of 1920*, 44 Yale L.Jour. 1 (1934).

## CHAPTER 9

### THE COMMERCE CLAUSE AND STATE POWERS<sup>1</sup>

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#### COOLEY v. BOARD OF PORT WARDENS.

Supreme Court of the United States, 1851. 12 How. 299, 13 L.Ed. 996.

[A Pennsylvania statute required all but certain excepted vessels to take on pilots for entering or leaving the port of Philadelphia, and required those not doing so to pay half-pilotage fees for the use of a society for aged pilots. A judgment, rendered against Cooley for such half-pilotage fees, was affirmed by the State Supreme Court. The case was then taken to this court by writ of error.]

Mr. Justice CURTIS delivered the opinion of the Court. \* \* \*

It remains to consider the objection, that it is repugnant to the third clause of the eighth section of the first article. "The Congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. Accordingly, the first Congress assembled under the Constitution passed laws, requiring the masters of ships and vessels of the United States to be citizens of the United States, and established many rules for the government and regulation

of officers and seamen. 1 Stat. at Large, 55, 131. These have been from time to time added to and changed, and we are not aware that their validity has been questioned.

Now, a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage-ground, is the temporary master charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew. He is not only one of the persons engaged in navigation, but he occupies a most important and responsible place among those thus engaged. And if Congress has power to regulate the seamen who assist the pilot in the management of the vessel, a power never denied, we can perceive no valid reason why the pilot should be beyond the reach of the same power. It is true that, according to the usages of modern commerce on the ocean, the pilot is on board only during a part of the voyage between ports of different States, or between ports of the United States and foreign countries; but if he is on board for such a purpose and during so much of the voyage as to be engaged in navigation, the power to regulate navigation extends to him while thus engaged, as clearly as it would if he were to remain on board throughout the whole passage, from port to port. For it is a power which extends to every part of the voyage, and may regulate those who conduct or assist in conducting navigation in one part of a voyage as much as in another part, or during the whole voyage. \* \* \*

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The act of Congress of the 7th of August, 1789, sect. 4, is as follows:

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further provision shall be made by Congress."

If the law of Pennsylvania, now in question, had been in existence at the date of this act of Congress, we might hold it to have been adopted by Congress, and thus made a law of the United States, and so valid. Because this act does, in effect, give the force of an act of Congress, to the then existing State laws on this subject, so long as they should continue unrepealed by the State which enacted them.

But the law on which these actions are founded was not enacted till 1803. What effect then can be attributed to so much of the act of 1789, as declares, that pilots shall continue to be

regulated in conformity, "with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress"?

If the States were divested of the power to legislate of this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power. And yet this act of 1789 gives its sanction only to laws enacted by the States. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a State acting in its legislative capacity, can be deemed a law, enacted by a State; and if the State has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress, did *per se* deprive the States of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution, (Federalist, No. 32), and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition of the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional

regulations. *Sturges v. Crowninshield*, 4 Wheat. 193; *Moore v. Houston*, 5 Wheat. 1; *Wilson v. Blackbird Creek Co.*, 2 Peters 251.

The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this act of 1789 as declares that pilots shall continue to be regulated "by such laws as the States may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the States a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important significance. It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject when examined, is

such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. How then can we say, that by the mere grant of power to regulate commerce, the States are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of Congress must be exclusive. This would be to affirm that the nature of the power is in any case something different from the nature of the subject to which, in such case, the power extends, and that the nature of the power necessarily demands, in all cases, exclusive legislation by Congress, while the nature of one of the subjects of that power, not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the States, in conformity with the circumstances of the ports within their limits. In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive by affirming of the power, what is not true of its subject now in question.

It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the States in the absence of all congressional legislation; nor to the general question how far any regulation of a subject by Congress may be deemed to operate as an exclusion of all legislation by the States upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to this particular subject in the state in which the legislation of Congress has left it. We go no further.

We have not adverted to the practical consequences of holding that the States possess no power to legislate for the regulation of pilots, though in our apprehension these would be of the most serious importance. For more than sixty years this subject has been acted on by the States, and the systems of some of them created and of others essentially modified during that

It is held that pilotage fees and penalties demanded and

received during that time, have been illegally exacted, under color of void laws, would work an amount of mischief which a clear conviction of constitutional duty, if entertained, must force us to occasion, but which could be viewed by no just mind without deep regret. Nor would the mischief be limited to the past. If Congress were now to pass a law adopting the existing State laws, if enacted without authority, and in violation of the Constitution, it would seem to us to be a new and questionable mode of legislation.

If the grant of commercial power in the Constitution has deprived the States of all power to legislate for the regulation of pilots, if their laws on this subject are mere usurpations upon the exclusive power of the general government, and utterly void, it may be doubted whether Congress could, with propriety, recognize them as laws, and adopt them as its own acts; and how are the legislatures of the States to proceed in future, to watch over and amend these laws, as the progressive wants of a growing commerce will require, when the members of those legislatures are made aware that they cannot legislate on this subject without violating the oaths they have taken to support the Constitution of the United States?

We are of opinion that this State law was enacted by virtue of a power, residing in the State to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the Supreme Court of Pennsylvania in each case must be affirmed.

Mr. Justice McLEAN and Mr. Justice WAYNE dissented; and Mr. Justice DANIEL, although he concurred in the judgment of the court, yet dissented from its reasoning.

#### NOTE

1. The Supreme Court, in *Gibbons v. Ogden*, supra, p. 263, did not give a definite answer to the question whether the commerce power was an exclusive or concurrent power, although Chief Justice Marshall inclined to the former view. The theory of Justice Curtis in the reported case is that it is exclusive with respect to some matters and concurrent with respect to others. Both views are consistent with a recognition that the states have retained some power to regulate activities and transactions occurring within their boundaries. Neither theory affords a satisfactory basis for determining the extent of the limitation which the commerce clause, of its own force, imposes on a state's exercise of its police power or any other of its powers. See H. W. Bikle, *The Silence of Congress*,

41 Harv.L.Rev. 200 (1927); J. B. Sholley, *The Negative Implications of the Commerce Clause*, 3 U.Chicago L.Rev. 556 (1936); N. T. Dowling, *Interstate Commerce and State Power*, 27 Va.L.Rev. 1 (1940); N. T. Dowling, *Interstate Commerce and State Power—Revised Version*, 47 Col.L.Rev. 547 (1947).

[ 2. The technique adopted in the reported case has frequently been followed where the activity or transaction regulated by the state constituted interstate commerce as distinguished from a local activity or transaction that merely affected interstate commerce; see *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County*, 234 U.S. 317, 34 S.Ct. 821, 58 L.Ed. 1330 (1914) (interstate ferry rates); *Penn. Gas Co. v. Public Service Commission*, 252 U.S. 23, 40 S.Ct. 279, 64 L.Ed. 434 (1920) (rates charged local consumers of gas delivered directly from points outside the consumers' state).

3. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), involved a California statute imposing a complicated scheme of regulation of the marketing of locally produced raisins practically all of which were ultimately destined for the interstate market. It was held that the commerce clause itself did not prevent the state from so regulating the marketing of a locally produced crop. The Court, after sustaining the state legislation on the ground that, as applied in the case before it, it regulated only wholly intrastate transactions, said: "But courts are not confined to so mechanical a test. When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct,' not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. There may also be, as in the present case, local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it." (pp. 362, 363 of 317 U.S., p. 319 of 63 S.Ct.)

4. Any valid exercise by Congress of its commerce power reduces the area within which state regulation may operate. It is immaterial whether the subject matter of the federal regulation is interstate commerce itself, or a local matter regulable by Congress because of its relation to interstate commerce. There have

been numerous cases in which the issue has been how far Congress intended by particular legislation to exclude state regulation; see *Southern Ry. Co. v. Reid*, 222 U.S. 424, 32 S.Ct. 140, 56 L.Ed. 257 (1912); *Kelly v. Washington*, 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3 (1937); *Hill v. Florida ex rel. Watson*, 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed. 1782 (1945); that this type of problem is not peculiar to the commerce power, see *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941) (federal control over aliens as limiting state control over them). See Note, "Occupation of the Field" in Commerce Clause Cases, 1936-1946, 60 Harv.L.Rev. 262 (1947).

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### SMITH v. ST. LOUIS & S. W. RY. CO.

Supreme Court of United States, 1901. 181 U.S. 248, 21 S.Ct. 603,  
45 L.Ed. 847.

[Error to the Court of Civil Appeals of Texas. The Texas livestock sanitary commission was authorized by law to establish quarantine and sanitary regulations for the protection of domestic stock. It was made their duty to investigate stock diseases alleged to exist and to adopt preventive measures. In June, 1897, the commission recited that it had reason to believe that anthrax had broken out in Louisiana or was liable to do so, and recommended that until after November 15, 1897, no cattle, horses, or mules be transported thence into Texas. The governor proclaimed this regulation. Plaintiff sued defendant railway for a consequent failure to deliver to him in Texas cattle shipped from Louisiana. The Court of Civil Appeals gave judgment for the defendant.]

Mr. Justice McKenna. \* \* \* To what extent the police power of the state may be exerted on traffic and intercourse within the state, without conflicting with the commerce clause of the Constitution of the United States, U.S.C.A.Const. art. 1, § 8, cl. 3, has not been precisely defined. In the case of *Henderson v. New York*, 92 U.S. 259, sub nom. *Henderson v. Wickham*, 23 L.Ed. 543, it was held that the statute of the state, which, aiming to secure indemnity against persons coming from foreign countries becoming a charge upon the state, required shipowners to pay a fixed sum for each passenger,—that is, to pay for all passengers,—not limiting the payment to those who might actually become such charge,—was void. Whether the statute would have been valid if so limited was not decided.

In *Chy Lung v. Freeman*, 92 U.S. 275, 23 L.Ed. 550, a statute declaring the same purpose as the New York statute, and apparently directed against persons mentally and physically infirm, and against convicted criminals and immoral women, was also declared void, because it imposed conditions on all passengers, and

invested a discretion in officers which could be exercised against all passengers. The court, by Mr. Justice Miller, said:

"We are not called upon by this statute to decide for or against the right of a state, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a state statute limited to provisions necessary and appropriate to that object alone shall, in a proper controversy, come before us, it will be time enough to decide that question."

In *Hannibal & St. J. R. Co. v. Husen*, 95 U.S. 465, 24 L.Ed. 527, a statute of Missouri which provided that "no Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this state between the 1st day of March and the 1st day of November in each year, by any person or persons whatsoever," was held to be in conflict with the clause of the Constitution which gives to Congress the power to regulate interstate commerce.

The case was an action for damages against the railroad company for bringing cattle into the state in violation of the act. A distinction was made between a proper and an improper exertion of the police power of the state. The former was confined to the prohibition of actually infected or diseased cattle and to regulations not transcending such prohibition. The statute was held not to be so confined, and hence was declared invalid.

\* \* \*

In *Schollenberger v. Pennsylvania*, 171 U.S. 1, 18 S.Ct. 757, 43 L.Ed. 49, some prior cases were reviewed, and the court, speaking by Mr. Justice Peckham, said:

"The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.

"In *Minnesota v. Barber*, 136 U.S. 313, 10 S.Ct. 862, 34 L.Ed. 455, 3 Interst.Com.R. 185, it was held that an inspection law relating to an article of food was not a rightful exercise of the police power of the state, if the inspection prescribed were of such a character, or if it were burdened with such conditions, as would wholly prevent the introduction of the sound article from other states. This was held in relation to the slaughter of animals whose meat was to be sold as food in the state passing the so-

called inspection law. The principle was affirmed in *Brimmer v. Rebman*, 138 U.S. 78, 11 S.Ct. 213, 34 L.Ed. 862, 3 Interst.Com.R. 485, and in *Scott v. Donald*, 165 U.S. 58, 97, 17 S.Ct. 265, 41 L.Ed. 632, 644."

The exclusion in the case at bar is not as complete as in the cited cases. That, however, makes no difference if it is within their principle; and their principle does not depend upon the number of states which are embraced in the exclusion. It depends upon whether the police power of the state has been exerted beyond its province,—exerted to regulate interstate commerce,—exerted to exclude, without discrimination, the good and the bad, the healthy and the diseased, and to an extent *beyond what is necessary for any proper quarantine*. The words in italics express an important qualification. The prevention of disease is the essence of a quarantine law. Such law is directed, not only to the actually diseased, but to what has become exposed to disease. In *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U.S. 455, 6 S.Ct. 1114, 30 L.Ed. 237, the quarantine system of Louisiana was sustained. It established a quarantine below New Orleans, provided health officers and inspection officers, and fees for them, to be paid by the ships detained and inspected. The system was held to be a proper exercise of the police power of the state for the protection of health, though some of its rules amounted to regulations of commerce with foreign nations and among the states. In *Kimmish v. Ball*, 129 U.S. 217, 9 S.Ct. 277, 32 L.Ed. 695, 2 Interst.Com.R. 407, certain sections of the laws of Iowa were passed on. One of them imposed a penalty upon any person who should bring into the state any Texas cattle, unless they had been wintered at least one winter north of the southern boundary of the state of Missouri or Kansas; or should have in his possession any Texas cattle between the 1st day of November and the 1st day of April following. Another section made any person having in his possession such cattle liable for any damages which might accrue from allowing them to run at large, "and thereby spreading the disease among other cattle, known as the Texas fever," and there was, besides, criminal punishment. The court did not pass upon the 1st section. In commenting upon the 2d some pertinent remarks were made on the facts which justified the statute, and the case of *Hannibal & St. J. R. Co. v. Husen*, 95 U.S. 465, 24 L.Ed. 527, was explained. It was said that the case "interpreted the law of Missouri as saying to all transportation companies: 'You shall not bring into the state any Texas cattle, or any Mexican cattle, or Indian cattle, between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the

state or not; and if you do bring them in, even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities.' Page 473, 24 L.Ed. 531. Such a statute, the court held, was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce, and therefore invalid. At the same time the court admitted unhesitatingly that a state may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it. Page 472, 24 L.Ed. 530. No attempt was made to show that all Texas, Mexican, or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different question would have been presented for the consideration of the court. Certainly all animals thus infected may be excluded from the state by its laws until they are cured of the disease, or at least until some mode of transporting them without danger of spreading it is devised."

In *Missouri, K. & T. R. Co. v. Haber*, 169 U.S. 613, 18 S.Ct. 488, 42 L.Ed. 878, the *Husen Case* was again commented upon, and what the law of Missouri was and was not was again declared. A statute of Kansas, however, which made any person who shall drive or ship into the state "any cattle liable or capable of communicating Texas, splenic or Spanish fever to any domestic cattle of this state shall be liable \* \* \* for \* \* \* damages," was held not to be a regulation of commerce. It was also held that the statute was not repugnant to the act of Congress of May 29, 1884 (23 Stat. at L. 31, chap. 60, 7 U.S.C.A. § 391, 21 U.S.C.A. § 112 et seq.), known as the Animal Industry Act.

What, however, is a proper quarantine law—what a proper inspection law in regard to cattle—has not been declared. Under the guise of either a regulation of commerce will not be permitted. Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained. *Henderson v. New York*, 92 U.S. 259, sub nom. *Henderson v. Wickham*, 23 L.Ed. 543, and *Chy Lung v. Freeman*, 92 U.S. 275, 23 L.Ed. 550. But we are not now put to any inquiry of that kind. The good faith and sincerity of the Texas officers cannot be doubted, and the statutes under which they acted cannot be justifiably complained of. The regulations prescribed are complained of, but are they not reasonably adaptive to the purpose of the statutes,—not in excess of it? Quarantine regulations cannot be the same for cattle as for persons, and must vary with the nature of the disease to be defended against. As the court of civil appeals said: "The necessities of such cases often require prompt action. If too long

delayed the end to be attained by the exercise of the power to declare a quarantine may be defeated and irreparable injury done."

It is urged that it does not appear that the action of the livestock sanitary commission was taken on sufficient information. It does not appear that it was not, and the presumption which the law attaches to the acts of public officers must obtain and prevail. The plaintiff in error relies entirely on abstract right, which he seems to think cannot depend upon any circumstances, or be affected by them. This is a radical mistake. It is the character of the circumstances which gives or takes from a law or regulation of quarantine a legal quality. In some cases the circumstance would have to be shown to sustain the quarantine, as was said in *Kimmish v. Ball*, 129 U.S. 217, 9 S.Ct. 277, 32 L.Ed. 695, 2 Interst.Com.R. 407. But the presumptions of the law are proof, and such presumptions exist in the pending case, arising from the provisions of and the duties enjoined by the statute, and sanction the action of the sanitary commission and the governor of the state. If they could have been, they should have been met and overcome, and the remarks of the court of civil appeals become pertinent:

"The facts in this case are not disputed. The plaintiff sues as for a conversion, because of a refusal to deliver his cattle at Fort Worth. It is necessary to his recovery that he show that it was the legal duty of the defendant company to make such delivery. It is for the breach of this alleged duty he sues; yet it nowhere appears from the record that before the quarantine line in question was established the sanitary commission did not make the most careful and thorough investigation into the necessity therefor, if, indeed, that matter could in any event be inquired into. So far as the record shows, every animal of the kind prohibited in the state of Louisiana may have been actually affected with charbon or anthrax; and it is conceded that this is a disease different from Texas or splenic fever, and that it is contagious and infectious and of the most virulent character."

Judgment affirmed.

[HARLAN and BROWN, JJ., gave dissenting opinions, with the former of which WHITE, J., concurred.]

#### NOTE

1. The commerce clause permits states to subject to its reasonable inspection laws interstate imports; *D. E. Foote & Co. v. Stanley*, 232 U.S. 494, 34 S.Ct. 377, 58 L.Ed. 698 (1914); *Askren v. Continental Oil Co.*, 252 U.S. 444, 40 S.Ct. 355, 64 L.Ed. 654 (1920); interstate exports, *Turner v. Maryland*, 107 U.S. 38, 2 S.Ct. 44, 27

L.Ed. 370 (1883); and persons entering the state, *Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health*, 118 U.S. 455, 6 S.Ct. 1114, 30 L.Ed. 237 (1886). Inspection laws discriminating against interstate or foreign commerce are prohibited, *Voight v. Wright*, 141 U.S. 62, 11 S.Ct. 855, 35 L.Ed. 638 (1891); *Minnesota v. Barber*, 136 U.S. 313, 10 S.Ct. 862, 34 L.Ed. 455 (1890).

2. As an incident to its right to inspect interstate imports and exports, a state may charge an inspection fee to cover cost of inspection; *D. E. Foote & Co. v. Stanley*, 232 U.S. 494, 34 S.Ct. 377, 58 L.Ed. 698 (1914); *Pure Oil Co. v. Minnesota*, 248 U.S. 153, 39 S.Ct. 35, 63 L.Ed. 180 (1918); *Standard Oil v. Graves*, 249 U.S. 389, 39 S.Ct. 320, 63 L.Ed. 662 (1919).

3. Const.U.S., art. 1, § 10, governs the matter of state inspection fees on foreign imports and exports. This permits states to impose them thereon without the consent of Congress, but their amount is subject to the control of, and revision by, Congress. See, for full discussion of such fees, *Patapasco Guano Co. v. North Carolina Board of Agriculture*, 171 U.S. 345, 18 S.Ct. 862, 43 L.Ed. 191 (1898).

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### EDWARDS v. PEOPLE OF STATE OF CALIFORNIA.

Supreme Court of the United States, 1941.  
314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119.

Mr. Justice BYRNES delivered the opinion of the Court.

The facts of this case are simple and are not disputed. Appellant is a citizen of the United States and a resident of California. In December, 1939, he left his home in Marysville, California, for Spur, Texas, with the intention of bringing back to Marysville, his wife's brother, Frank Duncan, a citizen of the United States and a resident of Texas. When he arrived in Texas, appellant learned that Duncan had last been employed by the Works Progress Administration. Appellant thus became aware of the fact that Duncan was an indigent person and he continued to be aware of it throughout the period involved in this case. The two men agreed that appellant should transport Duncan from Texas to Marysville in appellant's automobile. Accordingly, they left Spur on January 1, 1940, entered California by way of Arizona on January 3, and reached Marysville on January 5. When he left Texas, Duncan had about \$20. It had all been spent by the time he reached Marysville. He lived with appellant for about ten days until he obtained financial assistance from the Farm Security Administration. During the ten day interval, he had no employment.

In Justice Court a complaint was filed against appellant under Section 2615 of the Welfare and Institutions Code of California, St.1937, p. 1406, which provides: "Every person, firm or corpo-

ration, or officer or agent thereof that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person, is guilty of a misdemeanor." On demurrer to the complaint, appellant urged that the Section violated several provisions of the Federal Constitution. The demurrer was overruled, the cause was tried, appellant was convicted and sentenced to six months imprisonment in the county jail, and sentence was suspended.

On appeal to the Superior Court of Yuba County, the facts as stated above were stipulated. The Superior Court, although regarding as "close" the question of the validity of the Section, felt "constrained to uphold the statute as a valid exercise of the police power of the State of California". Consequently, the conviction was affirmed. No appeal to a higher state court was open to appellant. We noted probable jurisdiction early last term, and later ordered reargument (313 U.S. 545, 61 S.Ct. 956, 85 L.Ed. 1511) which has been held.

At the threshold of our inquiry a question arises with respect to the interpretation of Section 2615. On reargument, the Attorney General of California has submitted an exposition of the history of the Section, which reveals that statutes similar, though not identical to it have been in effect in California since 1860, see Cal.Stat. 1860, p. 213; Cal.Stat. 1901, p. 636; Cal.Stat. 1933, p. 2005. Neither under these forerunners nor under Section 2615 itself does the term "indigent person" seem to have been accorded an authoritative interpretation by the California courts. The appellee claims for the Section a very limited scope. It urges that the term "indigent person" must be taken to include only persons who are presently destitute of property and without resources to obtain the necessities of life, and who have no relatives or friends able and willing to support them. It is conceded, however, that the term is not confined to those who are physically or mentally incapacitated. While the generality of the language of the Section contains no hint of these limitations, we are content to assign to the term this narrow meaning.

Article I, Section 8 of the Constitution delegates to the Congress the authority to regulate interstate commerce. And it is settled beyond question that the transportation of persons is "commerce", within the meaning of that provision. It is nevertheless true that the States are not wholly precluded from exercising their police power in matters of local concern even though they may thereby affect interstate commerce. *California v. Thompson*, 313 U.S. 109, 113, 61 S.Ct. 930, 932, 85 L.Ed. 1219. The issue presented in this case, therefore, is whether the prohibition embodied in Section 2615 against the "bringing" or

transportation of indigent persons into California is within the police power of that State. We think that it is not, and hold that it is an unconstitutional barrier to interstate commerce.

The grave and perplexing social and economic dislocation which this statute reflects is a matter of common knowledge and concern. We are not unmindful of it. We appreciate that the spectacle of large segments of our population constantly on the move has given rise to urgent demands upon the ingenuity of government. Both the brief of the Attorney General of California and that of the Chairman of the Select Committee of the House of Representatives of the United States as *amicus curiae* have sharpened this appreciation. The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true. We have repeatedly and recently affirmed, and we now reaffirm, that we do not conceive it our function to pass upon "the wisdom, need, or appropriateness" of the legislative efforts of the States to solve such difficulties. See *Olsen v. Nebraska*, 313 U.S. 236, 246, 61 S.Ct. 862, 865, 85 L.Ed. 1305, 133 A.L.R. 1500.

But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But, in the words of Mr. Justice Cardozo: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. Seelig*, 294 U.S. 511, 523, 55 S.Ct. 497, 500, 79 L.Ed. 1032, 101 A.L.R. 55.

It is difficult to conceive of a statute more squarely in conflict with this theory than the Section challenged here. Its express purpose and inevitable effect is to prohibit the transportation of indigent persons across the California border. The burden upon interstate commerce is intended and immediate; it is the plain and sole function of the statute. Moreover, the indigent non-residents who are the real victims of the statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy. *South Carolina Highway Department v. Barnwell Bros.*, 303 U.S. 177, 185, note 2, 58 S.Ct. 510, 513, 82 L.Ed. 734. We think

this statute must fail under any known test of the validity of State interference with interstate commerce.

It is urged, however, that the concept which underlies Section 2615 enjoys a firm basis in English and American history. This is the notion that each community should care for its own indigent, that relief is solely the responsibility of local government. Of this it must first be said that we are not now called upon to determine anything other than the propriety of an attempt by a State to prohibit the transportation of indigent non-residents into its territory. The nature and extent of its obligation to afford relief to newcomers is not here involved. We do, however, suggest that the theory of the Elizabethan poor laws no longer fits the facts. Recent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character. The duty to share the burden, if not wholly to assume it, has been recognized not only by State governments, but by the Federal government as well. The changed attitude is reflected in the Social Security laws under which the Federal and State governments cooperate for the care of the aged, the blind and dependent children. U.S.C., Title 42, §§ 301-1307, 42 U.S.C.A. §§ 301-1307, esp. §§ 301, 501, 601, 701, 721, 801, 1201. It is reflected in the works programs under which work is furnished the unemployed, with the States supplying approximately 25% and the Federal government approximately 75% of the cost. See, e. g., Joint Resolution of June 26, 1940, c. 432 § 1(d), 76th Cong., 3rd Sess., 54 Stat. 611, 613, 15 U.S.C.A. §§ 721-728. It is further reflected in the Farm Security laws, under which the entire cost of the relief provisions is borne by the Federal government. *Id.*, at §§ 2(a), 2(b), 2(d).

Indeed the record in this very case illustrates the inadequate basis in fact for the theory that relief is presently a local matter. Before leaving Texas, Duncan had received assistance from the Works Progress Administration. After arriving in California he was aided by the Farm Security Administration, which, as we have said, is wholly financed by the Federal government. This is not to say that our judgment would be different if Duncan had received relief from local agencies in Texas and California. Nor is it to suggest that the financial burden of assistance to indigent persons does not continue to fall heavily upon local and State governments. It is only to illustrate that in not inconsiderable measure the relief of the needy has become the common responsibility and concern of the whole nation.

What has been said with respect to financing relief is not without its bearing upon the regulation of the transportation of indigent persons. For the social phenomenon of large-scale interstate migration is as certainly a matter of national concern as the provision of assistance to those who have found a permanent or temporary abode. Moreover, and unlike the relief problem, this phenomenon does not admit of diverse treatment by the several States. The prohibition against transporting indigent non-residents into one State is an open invitation to retaliatory measures, and the burdens upon the transportation of such persons become cumulative. Moreover, it would be a virtual impossibility for migrants and those who transport them to acquaint themselves with the peculiar rules of admission of many states. "This court has repeatedly declared that the grant [the commerce clause] established the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority." *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346, 351, 59 S.Ct. 528, 530, 83 L.Ed. 752. We are of the opinion that the transportation of indigent persons from State to State clearly falls within this class of subjects. The scope of Congressional power to deal with this problem we are not now called upon to decide.

There remains to be noticed only the contention that the limitation upon State power to interfere with the interstate transportation of persons is subject to an exception in the case of "paupers". It is true that support for this contention may be found in early decisions of this Court. In *City of New York v. Miln*, 11 Pet. 102, 103, at page 143, 9 L.Ed. 648, it was said that it is "as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported \* \* \*." This language has been casually repeated in numerous later cases up to the turn of the century. See, e. g., *Passenger Cases*, 7 How. 283, 426 and 466, 467, 12 L.Ed. 702; *Hannibal & St. J. Railway Company v. Husen*, 95 U.S. 465, 471, 24 L.Ed. 527; *Plumley v. Massachusetts*, 155 U.S. 461, 478, 15 S.Ct. 154, 160, 39 L.Ed. 223; *Missouri, Kansas & Topeka Ry. v. Haber*, 169 U.S. 613, 629, 18 S.Ct. 488, 494, 42 L.Ed. 878. In none of these cases, however, was the power of a State to exclude "paupers" actually involved.

Whether an able-bodied but unemployed person like Duncan is a "pauper" within the historical meaning of the term is open to considerable doubt. See 53 Harvard L.Rev. 1031, 1032. But assuming that the term is applicable to him and to persons similarly situated, we do not consider ourselves bound by the language referred to. *City of New York v. Miln* was decided in 1836. Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a "moral pestilence". Poverty and immorality are not synonymous.

We are of the opinion that Section 2615 is not a valid exercise of the police power of California, that it imposes an unconstitutional burden upon interstate commerce, and that the conviction under it cannot be sustained. In the view we have taken it is unnecessary to decide whether the Section is repugnant to other provisions of the Constitution.

Reversed.

Mr. Justice DOUGLAS and Mr. Justice JACKSON each wrote concurring opinions based on the privileges and immunities clause of Amendment 14.

#### NOTE

1. Three of the Justices held the California statute invalid solely for conflict with the privileges and immunities clause of Const. U.S. Amend. 14, § 1. Mr Justice Jackson based its invalidity thereon, although he conceded it could be rested on the commerce clause.

2. In *Hannibal & St. J. R. Co. v. Husen*, 95 U.S. 465, 24 L.Ed. 527 (1878), the Court stated that a state might "exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases."

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#### MORGAN v. COMMONWEALTH OF VIRGINIA.

Supreme Court of the United States, 1946.  
328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317.

Mr. Justice REED delivered the opinion of the Court.

This appeal brings to this Court the question of the constitutionality of an act of Virginia, which requires all passenger motor vehicle carriers, both interstate and intrastate, to separate without discrimination the white and colored passengers in their motor buses so that contiguous seats will not be occupied by per-

sons of different races at the same time. A violation of the requirement of separation by the carrier is a misdemeanor. The driver or other person in charge is directed and required to increase or decrease the space allotted to the respective races as may be necessary or proper and may require passengers to change their seats to comply with the allocation. The operator's failure to enforce the provisions is made a misdemeanor.

These regulations were applied to an interstate passenger, this appellant, on a motor vehicle then making an interstate run or trip. According to the statement of fact by the Supreme Court of Appeals of Virginia, appellant, who is a Negro, was traveling on a motor common carrier, operating under the above-mentioned statute, from Gloucester County, Virginia, through the District of Columbia, to Baltimore, Maryland, the destination of the bus. There were other passengers, both white and colored. On her refusal to accede to a request of the driver to move to a back seat, which was partly occupied by other colored passengers, so as to permit the seat that she vacated to be used by white passengers, a warrant was obtained and appellant was arrested, tried and convicted of a violation of Section 4097dd of the Virginia Code. On a writ of error the conviction was affirmed by the Supreme Court of Appeals of Virginia. 184 Va. 24, 34 S.E.2d 491. The Court of Appeals interpreted the Virginia statute as applicable to appellant since the statute "embraces all motor vehicles and all passengers, both interstate and intrastate." The Court of Appeals refused to accept appellant's contention that the statute applied was invalid as a delegation of legislative power to the carrier by a concurrent holding "that no power is delegated to the carrier to legislate. \* \* \* The statute itself condemns the defendant's conduct as a violation of law and not the rule of the carrier." *Id.*, 184 Va. at page 38, 34 S.E.2d at page 497. No complaint is made as to these interpretations of the Virginia statute by the Virginia court.

The errors of the Court of Appeals that are assigned and relied upon by appellant are in form only two. The first is that the decision is repugnant to Clause 3, Section 8, Article I of the Constitution of the United States, and the second the holding that powers reserved to the states by the Tenth Amendment include the power to require an interstate motor passenger to occupy a seat restricted for the use of his race. Actually, the first question alone needs consideration for if the statute unlawfully burdens interstate commerce, the reserved powers of the state will not validate it.

We think, as the Court of Appeals apparently did, that the appellant is a proper person to challenge the validity of this statute as a burden on commerce. If it is an invalid burden, the

conviction under it would fail. The statute affects appellant as well as the transportation company. Constitutional protection against burdens on commerce is for her benefit on a criminal trial for violation of the challenged statute. \* \* \*

This Court frequently must determine the validity of state statutes that are attacked as unconstitutional interferences with the national power over interstate commerce. This appeal presents that question as to a statute that compels racial segregation of interstate passengers in vehicles moving interstate.

The precise degree of a permissible restriction on state power cannot be fixed generally or indeed not even for one kind of state legislation, such as taxation or health or safety. There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation. Too true it is that the principle lacks in precision. Although the quality of such a principle is abstract, its application to the facts of a situation created by the attempted enforcement of a statute brings about a specific determination as to whether or not the statute in question is a burden on commerce. Within the broad limits of the principle, the cases turn on their own facts.

In the field of transportation, there have been a series of decisions which hold that where Congress has not acted and although the state statute affects interstate commerce, a state may validly enact legislation which has predominantly only a local influence on the course of commerce. It is equally well settled that, even where Congress has not acted, state legislation or a final court order is invalid which materially affects interstate commerce. Because the Constitution puts the ultimate power to regulate commerce in Congress, rather than the states, the degree of state legislation's interference with that commerce may be weighed by federal courts to determine whether the burden makes the statute unconstitutional. The courts could not invalidate federal legislation for the same reason because Congress, within the limits of the Fifth Amendment, has authority to burden commerce if that seems to it a desirable means of accomplishing a permitted end.

This statute is attacked on the ground that it imposed undue burdens on interstate commerce. It is said by the Court of Ap-

peals to have been passed in the exercise of the state's police power to avoid friction between the races. But this Court pointed out years ago "that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power." Burdens upon commerce are those actions of a state which directly "impair the usefulness of its facilities for such traffic." That impairment, we think, may arise from other causes than costs or long delays. A burden may arise from a state statute which requires interstate passengers to order their movements on the vehicle in accordance with local rather than national requirements.

On appellant's journey, this statute required that she sit in designated seats in Virginia. Changes in seat designation might be made "at any time" during the journey when "necessary or proper for the comfort and convenience of passengers." This occurred in this instance. Upon such change of designation, the statute authorizes the operator of the vehicle to require, as he did here, "any passenger to change his or her seat as it may be necessary or proper." An interstate passenger must if necessary repeatedly shift seats while moving in Virginia to meet the seating requirements of the changing passenger group. On arrival at the District of Columbia line, the appellant would have had freedom to occupy any available seat and so to the end of her journey.

Interstate passengers traveling via motors between the north and south or the east and west may pass through Virginia on through lines in the day or in the night. The large buses approach the comfort of pullmans and have seats convenient for rest. On such interstate journeys the enforcement of the requirements for reseating would be disturbing.

Appellant's argument, properly we think, includes facts bearing on interstate motor transportation beyond those immediately involved in this journey under the Virginia statutory regulations. To appraise the weight of the burden of the Virginia statute on interstate commerce, related statutes of other states are important to show whether there are cumulative effects which may make local regulation impracticable. Eighteen states, it appears, prohibit racial separation on public carriers. Ten require separation on motor carriers. Of these Alabama applies specifically to interstate passengers with an exception for interstate passengers with through tickets from states without laws on separation of passengers. The language of the other acts, like this Virginia statute before the Court of Appeals' decision in this case, may be said to be susceptible to an interpretation that they do or do not apply to interstate passengers.

In states where separation of races is required in motor vehicles, a method of identification as white or colored must be employed. This may be done by definition. Any ascertainable Negro blood identifies a person as colored for purposes of separation in some states. In the other states which require the separation of the races in motor carriers, apparently no definition generally applicable or made for the purposes of the statute is given. Court definition or further legislative enactments would be required to clarify the line between the races. Obviously there may be changes by legislation in the definition.

The interferences to interstate commerce which arise from state regulation of racial association on interstate vehicles has long been recognized. Such regulation hampers freedom of choice in selecting accommodations. The recent changes in transportation brought about by the coming of automobiles does not seem of great significance in the problem. People of all races travel today more extensively than in 1878 when this Court first passed upon state regulation of racial segregation in commerce. The factual situation set out in preceding paragraphs emphasizes the soundness of this Court's early conclusion in *Hall v. De Cuir*, 95 U.S. 485, 24 L.Ed. 547.

The *De Cuir* case arose under a statute of Louisiana interpreted by the courts of that state and this Court to require public carriers "to give all persons travelling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color." 95 U.S. at page 487, 24 L.Ed. 547. Damages were awarded against Hall, the representative of the operator of a Mississippi river steamboat that traversed that river interstate from New Orleans to Vicksburg, for excluding in Louisiana the defendant in error, a colored person, from a cabin reserved for whites. This Court reversed for reasons well stated in the words of Mr. Chief Justice Waite. As our previous discussion demonstrates, the transportation difficulties arising from a statute that requires commingling of the races, as in the *De Cuir* case, are increased by one that requires separation, as here. Other federal courts have looked upon racial separation statutes as applied to interstate passengers as burdens upon commerce.

In weighing the factors that enter into our conclusion as to whether this statute so burdens interstate commerce or so infringes the requirements of national uniformity as to be invalid, we are mindful of the fact that conditions vary between northern or western states such as Maine or Montana, with practically no colored population; industrial states such as Illinois, Ohio, New Jersey and Pennsylvania with a small, although appreciable,

percentage of colored citizens; and the states of the deep south with percentages of from twenty-five to nearly fifty per cent colored, all with varying densities of the white and colored race in certain localities. Local efforts to promote amicable relations in difficult areas by legislative segregation in interstate transportation emerge from the latter racial distribution. As no state law can reach beyond its own border nor bar transportation of passengers across its boundaries, diverse seating requirements for the races in interstate journeys result. As there is no federal act dealing with the separation of races in interstate transportation, we must decide the validity of this Virginia statute on the challenge that it interferes with commerce, as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel. It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid.

Reversed.

Mr. Justice RUTLEDGE concurs in the result. Mr. Justice BLACK and Mr. Justice FRANKFURTER each wrote a concurring opinion. Mr. Justice BURTON wrote a dissenting opinion.

#### NOTE

1. Cf. with reported case, *South Covington & C. Street Ry. Co. v. Kentucky*, 252 U.S. 399, 40 S.Ct. 378, 64 L.Ed. 631 (1920).

A state Civil Rights Act prohibiting discrimination against negroes was held not violative of the commerce clause as applied to the transportation by water of persons in foreign commerce between points within the state and Canada. *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 68 S.Ct. 358, 92 L.Ed. — (1948).

2. A state may not completely deny a person the right to engage in interstate transportation, therein, *Gibbons v. Ogden*, *supra*, p. 263. It may not require those wishing to use its highways for interstate transportation to procure from it a certificate of convenience and necessity. *Buck v. Kuykendall*, 267 U.S. 307, 45 S.Ct. 324, 69 L.Ed. 623 (1925); *Bush & Sons v. Maloy*, 267 U.S. 317, 45 S.Ct. 326, 69 L.Ed. 627 (1925); cf. *Bradley v. Public Utilities Commission of Ohio*, 289 U.S. 92, 53 S.Ct. 577, 77 L.Ed. 1053 (1933). It may, however, impose conditions upon the use of its highways for interstate transport if their purpose and effect is to promote safety or another legitimate local interest, *Kane v. New Jersey*, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222 (1916); *Hendrick v. Maryland*, 235 U.S. 610, 35 S.Ct. 140, 59 L.Ed. 385 (1915); *Hicklin v. Coney*, 290 U.S. 169,

54 S.Ct. 142, 78 L.Ed. 247 (1934); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 (1938); and charge compensatory fees for the use of its highways, *Clark v. Poor*, 274 U.S. 554, 47 S.Ct. 702, 71 L.Ed. 1199 (1927); *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 51 S.Ct. 380, 75 L.Ed. 953 (1931); *Ingels v. Morf*, 300 U.S. 290, 57 S.Ct. 439, 81 L.Ed. 653 (1937); *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245, 48 S.Ct. 230, 72 L.Ed. 551 (1928); *Aero Mayflower Transit Co. v. Bd. of Railroad Commissioners of Montana*, 332 U.S. 495, 68 S.Ct. 167, 92 L.Ed. — (1947). See on state regulation of interstate motor carriers, P. G. Kauper, *State Regulation of Interstate Motor Carriers*, 31 Mich.L.Rev. 920, 1037 (1933).

3. State regulation of interstate railroad transportation has produced a vast body of decision. See for excellent discussion of judicial approach to problems of its validity under the commerce clause *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). The tendency of the Supreme Court to reduce the limiting effect of the commerce clause upon state powers is shown in *California v. Thompson*, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219 (1941).

4. The commerce clause has been held, almost without exception, to prohibit state regulation of rates for interstate transportation, *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U.S. 557, 7 S.Ct. 4, 30 L.Ed. 244 (1886); *Public Utilities Commission of R. I. v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549 (1927); *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298, 44 S.Ct. 544, 68 L.Ed. 1027 (1924); cf. *Penn. Gas Co. v. Public Service Commission*, 252 U.S. 23, 40 S.Ct. 279, 64 L.Ed. 434 (1920); *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. — (1947). The case of interstate ferries is an exception to the general rule; see *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County*, 234 U.S. 317, 34 S.Ct. 821, 58 L.Ed. 1330 (1914).

5. The commerce clause prohibits a state from permitting its courts to assume jurisdiction of actions if to do so unduly burdens interstate commerce; see *Davis v. Farmers' Co-op. Equity Co.*, 262 U.S. 312, 43 S.Ct. 556, 67 L.Ed. 996 (1923); *International Milling Co. v. Columbia Transportation Co.*, 292 U.S. 511, 54 S.Ct. 797, 78 L.Ed. 1396 (1934). See P. S. Farrier, *Suits Against Foreign Corporations As a Burden on Interstate Commerce*, 17 Minn.L.Rev. 381 (1919); Note, *Jurisdiction Over Non-Resident Carriers as Limited by the Doctrine of Unreasonable Burden on Interstate Commerce*, 34 Mich.L.Rev. 979 (1936).

## SLIGH v. KIRKWOOD.

Supreme Court of the United States, 1915. 237 U.S. 52, 35 S.Ct. 501,  
59 L.Ed. 835.

Mr. Justice DAY delivered the opinion of the court:

A statute of the state of Florida undertakes to make it unlawful for any one to sell, offer for sale, ship, or deliver for shipment, any citrus fruits which are immature or otherwise unfit for consumption.

Plaintiff in error, S. J. Sligh, was charged by information containing three counts in the criminal court of record in Orange county, Florida, with violation of this statute. One of the counts charged that Sligh delivered to an agent of the Seaboard Air Line Railway Company, a common carrier, for shipment to Winecoff & Adams, Birmingham, Alabama, one car of oranges, which were citrus fruits, then and there immature and unfit for consumption. Upon petition for writ of habeas corpus in the circuit court of Florida for Orange county, the court refused to order the release of Sligh, and remanded him to the custody of the sheriff. Upon writ of error to the supreme court of Florida, that judgment was affirmed (65 Fla. 123, 61 So. 185), and the case is brought here.

The single question is: Was it within the authority of the state of Florida to make it a criminal offense to deliver for shipment in interstate commerce citrus fruits,—oranges in this case,—then and there immature and unfit for consumption?

It will be observed that the oranges must not only be immature, but they must be in such condition as renders them unfit for consumption; that is, giving the words their ordinary signification, unfit to be used for food. Of course, fruits of this character, in that condition, may be deleterious to the public health, and, in the public interest, it may be highly desirable to prevent their shipment and sale. Not disputing this, the contention of the plaintiff in error is that the statute contravenes the Federal Constitution in that the legislature has undertaken to pass a law beyond the power of the state, because of the exclusive control of Congress over commerce among the states, under the Federal Constitution, U.S.C.A.Const. art. 1, § 8, cl. 3.

That Congress has the exclusive power to regulate interstate commerce is beyond question, and when that authority is exerted by the state, even in the just exercise of the police power, it may not interfere with the supreme authority of Congress over the subject; while this is true, this court from the begin-

ning has recognized that there may be legitimate action by the state in the matter of local regulation, which the state may take until Congress exercises its authority upon the subject. This subject has been so frequently dealt with in decisions of this court that an extended review of the authorities is unnecessary. See the *Minnesota Rate Cases*, *Simpson v. Shepard*, 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151.

While this proposition seems to be conceded, and the competency of the state to provide local measures in the interest of the safety and welfare of the people is not doubted, although such regulations incidentally and indirectly involve interstate commerce, the contention is that this statute is not a legitimate exercise of the police power, as it has the effect to protect the health of people in other states who may receive the fruits from Florida in a condition unfit for consumption; and however commendable it may be to protect the health of such foreign peoples, such purpose is not within the police power of the state.

The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the state, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the state. *New York v. Miln*, 11 Pet. 102, 139, 9 L.Ed. 648, 662. The police power, in its broadest sense, includes all legislation and almost every function of civil government. *Barbier v. Connolly*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923. It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. *Camfield v. United States*, 167 U.S. 518, 524, 17 S.Ct. 864, 42 L.Ed. 260, 262. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. *Chicago, B. & Q. R. Co. v. Illinois*, 200 U.S. 561, 592, 26 S.Ct. 341, 50 L.Ed. 596, 609, 4 Ann.Cas. 1175. In one of the latest utterances of this court upon the subject, it was said: "Whether it is a valid exercise of the police power is the question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the pub-

lic convenience or the general prosperity. \* \* \* And further, 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.' " *Eubank v. Richmond*, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156, 42 L.R.A.,N.S., 1123, Ann.Cas.1914B, 192.

The power of the state to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established. Such articles, it has been declared by this court, are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution. "Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution." *Bowman v. Chicago & N. W. R. Co.*, 125 U.S. 465, 489, 8 S.Ct. 689, 1062, 31 L.Ed. 700, 708, 1 Inters.Com.Rep. 823.

Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state. In *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793, a conviction was sustained of one who was charged with having in his possession game birds, killed within the state, with the intention of procuring transportation of the same beyond state limits. This law was attacked upon the ground that it was a direct attempt to regulate commerce among the states. After discussing the peculiar nature of such property, and the power of the state over it, this court said (page 534, 16 S.Ct. page 606): "Aside from the authority of the state, derived from the common ownership of game and the trust for the benefit of its people which the state exercises in relation thereto, there is another view of the power of the state in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play because by doing so interstate commerce may be remotely and indirectly affected. *Kidd v. Pearson*, 128 U.S. 1, 9 S.Ct. 6, 32 L.Ed. 346, 2 Inters.Com.Rep. 232; *Hall v. De Cuir*, 95 U.S. 485, 24 L.Ed. 547; *Sherlock v. Alling*, 93 U.S. 99, 103, 23 L.Ed. 819, 820; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23." In *New York ex rel. Silz v. Hesterberg*, 211 U.S. 31, 29 S.Ct. 10, 53 L.Ed. 75, it was

held that the state might punish the sale of imported game during the closed season in New York, notwithstanding such game was imported from abroad, and was thus beyond the control of the state, the law being sustained upon the ground that, while foreign commerce was incidentally affected, the state might prohibit the sale of such game in order to protect local game during the closed season; and to make such regulations effective required the prohibition of the sale of all game of that kind.

So it may be taken as established that the mere fact that interstate commerce is indirectly affected will not prevent the state from exercising its police power, at least until Congress, in the exercise of its supreme authority, regulates the subject. Furthermore, this regulation cannot be declared invalid if within the range of the police power, unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the legislature, assuming the subject to be a proper matter of state regulation.

We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. The shipment of fruits so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the state. The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose.

As to the suggestion that the shipment of such fruit may be legitimately made for commercial purposes, for the purpose of making wine, citric acid, and possibly other articles, it is sufficient to say that this case does not present any such state of facts, and of course the constitutional objection must be considered in view of the case made before the court, which was a delivery for shipment of oranges so immature as to be unfit for consumption. Whether such a case, as supposed, of shipment for commercial purposes, would be within the statute, would be primarily for the state court to determine, and it is not for us to say, as no such case is here presented.

It is pointed out in the opinion of the supreme court of Florida, and we repeat here, that no act of Congress has been called to our attention undertaking to regulate shipments of this character, which would be contravened by the act in question. As the Florida court says, the sixth subdivision of the food and drugs act, if citrus fruits should be held to be within the prohibitions against vegetable substances, includes only such as are in whole or in part filthy, decomposed, or putrid. Green or immature fruit, equally deleterious to health does not seem to be within the Federal act. Therefore until Congress does legislate upon the subject, the state is free to enter the field. *Savage v. Jones*, 225 U.S. 501, 32 S.Ct. 715, 56 L.Ed. 1182.

In the Vermont case, referred to by counsel for plaintiff in error (*State v. Peet*, 80 Vt. 449, 68 A. 661, 14 L.R.A., N.S., 677, 130 Am.St.Rep. 998), the act made it unlawful to ship without the state veal less than four weeks old when killed, and it was held to run counter to the Federal act and regulation upon the same subject.

We find no error in the judgment of the Supreme Court of Florida, and it is affirmed.

#### NOTE

1. The attempts of states to prohibit or limit the export to other states of their natural resources has generally been held prohibited by the commerce clause; see *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 31 S.Ct. 564, 55 L.Ed. 716 (1911); *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923); cf. *Peoples Natural Gas Co. v. Public Service Commission of Pa.*, 270 U.S. 550, 46 S.Ct. 371, 70 L.Ed. 726 (1926). Excepted are such natural resources as are generally held owned by the state in trust for its people; see *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896); but it may not use its power over such resources to benefit local industry at the expense of that outside the state, *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147 (1928); *Toomer v. Witsell*, — U.S. —, 68 S.Ct. 1156, 92 L.Ed. — (1948); cf. *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772 (1936).

2. See J. P. Hardman, *The Right of a State to Restrain the Exportation of Natural Resources*, 26 W.Va.L.Rev. 1 (1939); D. Williams, *The Power of the State to Control the Use of Its Natural Resources*, 11 Minn.L.Rev. 129, 233 (1927).

## BALDWIN v. G. A. F. SEELIG, INC.

Supreme Court of the United States, 1935. 294 U.S. 511, 55 S.Ct. 497,  
79 L.Ed. 1032, 101 A.L.R. 55.

Mr. Justice CARDOZO delivered the opinion of the Court.

Whether and to what extent the New York Milk Control Act (N.Y.Laws 1933, c. 158; Laws 1934, c. 126 [Agriculture and Markets Law N.Y., Consol.Laws, c. 69, §§ 252-258-r]) may be applied against a dealer who has acquired title to the milk as the result of a transaction in interstate commerce is the question here to be determined.

G. A. F. Seelig, Inc. (appellee in No. 604 and appellant in No. 605) is engaged in business as a milk dealer in the city of New York. It buys its milk, including cream, in Fair Haven, Vt., from the Seelig Creamery Corporation, which in turn buys from the producers on the neighboring farms. The milk is transported to New York by rail in 40-quart cans; the daily shipment amounting to about 200 cans of milk and 20 cans of cream. Upon arrival in New York about 90 per cent. is sold to customers in the original cans; the buyers being chiefly hotels, restaurants, and stores. About 10 per cent. is bottled in New York, and sold to customers in bottles. By concession title passes from the Seelig Creamery to G. A. F. Seelig, Inc., at Fair Haven, Vt. For convenience the one company will be referred to as the Creamery and the other as Seelig.

The New York Milk Control Act, with the aid of regulations made thereunder, has set up a system of minimum prices to be paid by dealers to producers. The validity of that system in its application to producers doing business in New York state has support in our decisions. *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469; *Hegeman Farms Corporation v. Baldwin*, 293 U.S. 163, 55 S.Ct. 7, 79 L.Ed. 259. Cf. *Borden's Farm Products Co., Inc., v. Baldwin*, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281. From the farms of New York the inhabitants of the so-called Metropolitan milk district, compris-

ing the city of New York and certain neighboring communities, derive about 70 per cent. of the milk requisite for their use. To keep the system unimpaired by competition from afar, the act has a provision whereby the protective prices are extended to that part of the supply (about 30 per cent.) which comes from other states. The substance of the provision is that, so far as such a prohibition is permitted by the Constitution, there shall be no sale within the state of milk bought outside unless the price paid to the producers was one that would be lawful upon a like transaction within the state. The statute, so far as pertinent, is quoted in the margin, together with supplementary regulations by the Board of Milk Control.

Seelig buys its milk from the Creamery in Vermont at prices lower than the minimum payable to producers in New York. The Commissioner of Farms and Markets refuses to license the transaction of its business unless it signs an agreement to conform to the New York statute and regulations in the sale of the imported product. This the applicant declines to do. Because of that refusal other public officers, parties to these appeals, announce a purpose to prosecute for trading without a license and to recover heavy penalties. This suit has been brought to restrain the enforcement of the act in its application to the complainant; repugnancy being charged between its provisions when so applied and limitations imposed by the Constitution of the United States. United States Constitution, art. 1, § 8, cl. 3; Fourteenth Amendment, § 1, U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14, § 1. A District Court of three judges, organized in accordance with section 266 of the Judicial Code (28 U.S.C. § 380, 28 U.S.C.A. § 380), has granted a final decree restraining the enforcement of the act in so far as sales are made by the complainant while the milk is in the cans or other original packages in which it was brought into New York, but refusing an injunction as to milk taken out of the cans for bottling, and thereafter sold in bottles. See opinion on application for interlocutory injunction, 7 F.Supp. 776; and cf. 293 U.S. 522, 55 S. Ct. 120, 79 L.Ed. 634, October 15, 1934. The case is here on cross-appeals. 28 U.S.C. § 380, 28 U.S.C.A. § 380.

First. An injunction was properly granted restraining the enforcement of the act in its application to sales in the original packages.

New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. This again is not disputed. Accepting

those postulates, New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York. The importer in that view may keep his milk or drink it, but sell it he may not.

Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed, by an express prohibition of the Constitution, beyond the power of a state, "except what may be absolutely necessary for executing its inspection Laws." Constitution, art. 1, § 10, cl. 2, U.S.C.A.Const. art. 1, § 10, cl. 2; *Woodruff v. Parham*, 8 Wall. 123, 19 L.Ed. 382. Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, art. 1, § 8, cl. 3, U.S.C.A.Const. art. 1, § 8, cl. 3. "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." *International Textbook Co. v. Pigg*, 217 U.S. 91, 112, 30 S.Ct. 481, 487, 54 L.Ed. 678, 27 L.R.A.,N.S., 493, 18 Ann.Cas. 1103; and see *Brennan v. Titusville*, 153 U.S. 289, 14 S.Ct. 829, 38 L.Ed. 719; *Brown v. Houston*, 114 U.S. 622, 5 S.Ct. 1091, 29 L.Ed. 257; *Webber v. Virginia*, 103 U.S. 344, 351, 26 L.Ed. 565; *Kansas City Southern R. Co. v. Kaw Valley Drainage District*, 233 U.S. 75, 79, 34 S.Ct. 564, 58 L.Ed. 857. Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." *Farrand, Records of the Federal Convention*, vol. II, p. 308; vol. III, pp. 478, 547, 548; the *Federalist*, No. XLII; *Curtis, History of the Constitution*, vol. 1, p. 502; *Story on the Constitution*, § 259. If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk; the supply being put in jeopardy when the farmers of the state are unable to earn a living income. *Nebbia v. New York*, *supra*. Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

We have dwelt up to this point upon the argument of the state that economic security for farmers in the milk shed may be a means of assuring to consumers a steady supply of a food of prime necessity. There is, however, another argument which seeks to establish a relation between the well-being of the producer and the quality of the product. We are told that farmers who are underpaid will be tempted to save the expense of sanitary precautions. This temptation will affect the farmers outside New York as well as those within it. For that reason, the exclusion of milk paid for in Vermont below the New York minimum will tend, it is said, to impose a higher standard of quality and thereby promote health. We think the argument will not avail to justify impediments to commerce between the states. There is neither evidence nor presumption that the same minimum prices established by order of the board for producers in New York are necessary also for producers in Vermont. But apart from such defects of proof, the evils springing from uncared for cattle must be remedied by measures of re-

pression more direct and certain than the creation of a parity of prices between New York and other states. Appropriate certificates may be exacted from farmers in Vermont and elsewhere (*Mintz v. Baldwin*, 289 U.S. 346, 53 S.Ct. 611, 77 L.Ed. 1245; *Reid v. Colorado*, 187 U.S. 137, 23 S.Ct. 92, 47 L.Ed. 108); milk may be excluded if necessary safeguards have been omitted; but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product. The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business. Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states. Cf. *Asbell v. Kansas*, 209 U.S. 251, 256, 28 S.Ct. 485, 52 L.Ed. 778, 14 Ann.Cas. 1101; *Hannibal & St. J. Railroad Co. v. Husen*, 95 U.S. 465, 472, 24 L.Ed. 527. One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, the Legislature of Vermont and not that of New York must supply the fitting remedy.

Many cases from our reports are cited by counsel for the state. They do not touch the case at hand. The line of division between direct and indirect restraints of commerce involves in its marking a reference to considerations of degree. Even so, the borderland is wide between the restraints upheld as incidental and those attempted here. Subject to the paramount power of the Congress, a state may regulate the importation of unhealthy swine or cattle (*Asbell v. Kansas*, *supra*; *Mintz v. Baldwin*, *supra*) or decayed or noxious foods. *Crossman v. Lurman*, 192 U.S. 189, 24 S.Ct. 234, 48 L.Ed. 401; *Savage v. Jones*, 225 U.S. 501, 32 S.Ct. 715, 56 L.Ed. 1182; *Price v. Illinois*, 238 U.S. 446, 35 S.Ct. 892, 59 L.Ed. 1400. Things such as these are not proper subjects of commerce, and there is no unreasonable interference when they are inspected and excluded. So a state may protect its inhabitants against the fraudulent substitution, by deceptive coloring or otherwise, of one article for another. *Plumley v. Massachusetts*, 155 U.S. 461, 15 S.Ct. 154, 39 L.Ed. 223; *Hebe Co. v. Shaw*, 248 U.S. 297, 39 S.Ct. 125, 63 L.Ed. 255; *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed. 402. It may give protection to travelers against the dangers of overcrowded highways (*Bradley v. Public Utilities Commission*,

289 U.S. 92, 53 S.Ct. 577, 77 L.Ed. 1053, 85 A.L.R. 1131) and protection to its residents against unnecessary noises. *Hennington v. Georgia*, 163 U.S. 299, 16 S.Ct. 1086, 41 L.Ed. 166. Cf., however, *Missouri, Kansas & Texas R. Co. v. Texas*, 245 U.S. 484, 488, 38 S.Ct. 178, 62 L.Ed. 419, L.R.A.1918C, 535. At times there are border cases, such as *People of State of New York ex rel. Silz v. Hesterberg*, 211 U.S. 31, 29 S.Ct. 10, 53 L.Ed. 75, where the decision in all likelihood was influenced, even if it is not wholly explained, by a recognition of the special and restricted nature of rights of property in game. Interference was there permitted with sale and importation, but interference for a closed season and no longer, and in aid of a policy of conservation common to many states. Cf. *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793; *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 11, 49 S.Ct. 1, 73 L.Ed. 147; *People ex rel. Silz v. Hesterberg*, 184 N.Y. 126, 131, 76 N.E. 1032, 3 L.R.A.,N.S., 163, 128 Am.St.Rep. 528, 6 Ann.Cas. 353. None of these statutes—inspection laws, game laws, laws intended to curb fraud or exterminate disease—approaches in drastic quality the statute here in controversy which would neutralize the economic consequences of free trade among the states.

Second. There was error in refusing an injunction to restrain the enforcement of the act in its application to milk in bottles to be sold by the importer.

The test of the "original package," which came into our law with *Brown v. Maryland*, 12 Wheat. 419, 6 L.Ed. 678, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries. Cf. *Woodruff v. Parham*, *supra*; *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218, 226, 53 S.Ct. 373, 77 L.Ed. 710. There are purposes for which merchandise, transported from another state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. This is so for illustration, where merchandise so contained is subjected to a nondiscriminatory property tax which it bears equally with other merchandise produced within the state. *Sonneborn Bros. v. Cureton*, 262 U.S. 506, 43 S.Ct. 643, 67 L.Ed. 1095; *Texas Co. v. Brown*, 258 U.S. 466, 475, 42 S.Ct. 375, 66 L.Ed. 721; *American Steel & Wire Co. v. Speed*, 192 U.S. 500, 24 S.Ct. 365, 48 L.Ed. 538. There are other purposes for which the same merchandise will have the benefit of the protection appropriate to interstate commerce, though the original packages have been broken and the contents subdivided. "A state tax upon merchandise brought in from another state or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only

when the tax is not discriminating in its incidence against the merchandise because of its origin in another state." *Sonneborn Bros. v. Cureton*, *supra*, at page 516 of 262 U.S., 43 S.Ct. 643, 646. Cf. *McDermott v. Wisconsin*, 228 U.S. 115, 133, 33 S.Ct. 431, 57 L.Ed. 754, 47 L.R.A.,N.S., 984, Ann.Cas.1915A, 39; *Bowman v. Chicago & N. W. R. Co.*, 125 U.S. 465, 491, 8 S.Ct. 689, 1062, 31 L.Ed. 700; *Brimmer v. Rebman*, 138 U.S. 78, 11 S.Ct. 213, 35 L. Ed. 862; *Savage v. Jones*, *supra*, at page 525 of 225 U.S., 32 S.Ct. 715; *Western Union Tel. Co. v. Foster*, 247 U.S. 105, 114, 38 S. Ct. 438, 62 L.Ed. 1006, 1 A.L.R. 1278; *Pacific Co. v. Johnson*, 285 U.S. 480, 493, 52 S.Ct. 424, 76 L.Ed. 893. In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. *Pennsylvania Gas Co. v. Public Service Commission*, 225 N.Y. 397, 403, 122 N.E. 260. It marks a convenient boundary, and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended.

The statute here in controversy will not survive that test. A dealer in milk buys it in Vermont at prices there prevailing. He brings it to New York, and is told he may not sell it if he removes it from the can and pours it into bottles. He may not do this for the reason that milk in Vermont is cheaper than milk in New York at the regimented prices, and New York is moved by the desire to protect her inhabitants from the cut prices and other consequences of Vermont competition. To overcome that competition a common incident of ownership, the privilege of sale in convenient receptacles, is denied to one who has bought in interstate commerce. He may not sell on any terms to any one, whether the orders were given in advance or came to him thereafter. The decisions of this court as to the significance of the original package in interstate transactions were not meant to be a cover for retortion or suppression.

The distinction is clear between a statute so designed and statutes of the type considered in *Leisy v. Hardin*, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128, to take one example out of many available. By the teaching of that decision intoxicating liquors are not subject to license or prohibition by the state of destination without congressional consent. They become subject, however, to such laws when the packages are broken. There is little, if any, analogy between restrictions of that type and those in controversy here. In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin. What it does is no more than to apply its domestic policy, rooted in its conceptions of morality and order, to property which for such a purpose may fairly be deemed to have passed out of commerce and to be commingled in an absorbing mass. So, also, the analogy is remote between restrictions like the present ones upon the sale of imported milk and restrictions affecting sales in unsanitary sweatshops. It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale of prices for use in other states, and to bar the sale of the products, whether in the original packages or in others, unless the scale has been observed.

The decree in No. 604 is affirmed, and that in No. 605 reversed, and the cause remanded for proceedings in accordance with this opinion.

It is so ordered.

### NOTE

1. State efforts to hamper interstate commercial intercourse have usually been held to conflict with the commerce clause; see *Real Silk Hosiery Mills, Inc. v. Portland*, 268 U.S. 325, 45 S.Ct. 525, 69 L.Ed. 982 (1925); *Lemke v. Farmers' Grain Co.*, 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458 (1922); *Shafer v. Farmers' Grain Co.*, 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909 (1925); but see *Bourjois, Inc. v. Chapman*, 301 U.S. 183, 57 S.Ct. 691, 81 L.Ed. 1027 (1937).

2. The "original package doctrine," discussed in the reported case, relates only to the sale of goods brought into a state, not to the delivery therein of goods in response to an order previously taken therein or through the mails, *Rearick v. Pennsylvania*, 203 U.S. 507, 27 S.Ct. 159, 51 L.Ed. 295 (1906). As to extent that such sales are protected against action by state of sale, compare *Plumley v. Massachusetts*, 155 U.S. 461, 15 S.Ct. 154, 39 L.Ed. 223 (1894), *Schollenberger v. Pennsylvania*, 171 U.S. 1, 18 S.Ct. 757, 43 L.Ed. 49 (1897), and *Collins v. New Hampshire*, 171 U.S. 30, 18 S.Ct. 768, 43 L.Ed. 60 (1898). For interesting attempts to evade state prohibitions

against sale of cigarettes, see *Austin v. Tennessee*, 179 U.S. 343, 21 S.Ct. 132, 45 L.Ed. 224 (1900), and *Cook v. Marshall County*, 196 U.S. 261, 25 S.Ct. 233, 49 L.Ed. 471 (1905), which discuss what constitutes an "original package."

3. States have sometimes sought to force foreign corporations engaged within them in interstate or foreign commerce exclusively to comply with certain of their regulatory measures by denying or limiting access to their courts. Such a statute was held violative of the commerce clause in *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 35 S.Ct. 57, 59 L.Ed. 193 (1914); cf. recent case of *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 64 S.Ct. 967, 88 L.Ed. 1227 (1944). Such corporations may be subjected to controls to protect residents dealing with it, *International Harvester Co. v. Kentucky*, 234 U.S. 579, 34 S.Ct. 944, 58 L.Ed. 1479 (1914); and see discussion in *Robertson v. California*, 328 U.S. 440, 66 S.Ct. 1160, 90 L.Ed. 1366 (1946).

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### WHITFIELD v. OHIO.

Supreme Court of the United States. 1936. 297 U.S. 431, 56 S.Ct. 532, 80 L.Ed. 778.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

Petitioner was charged in the municipal court of Cleveland with a violation of section 2228-1 of the Ohio General Code, adopted March 23, 1933, which provides: "After January 19, 1934, no goods, wares or merchandise, manufactured or mined wholly or in part in any other state by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this state." By section 2228-2, a violation of this provision subjects the offender to a fine of not less than \$25 nor more than \$50 for the first offense. An Act of Congress passed January 19, 1929 (effective five years later), c. 79, §§ 1, 2, 45 Stat. 1084, title 49 U.S.C. § 60, 49 U.S.C.A. § 60, commonly called the Hawes-Cooper Act, provides that "All goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise." \* \* \*

2. A serious question as to the infringement of the commerce clause of the Constitution (U.S.C.A.Const. art. 1, § 8, cl. 3) is presented by the second count of the information. That count alleges that the prison-made goods described were sold to a purchaser in Ohio for shipment via railway express from a prison in Alabama. Whether the court below intended to sustain this count is not clear; but the state confines its argument here to a defense of its asserted power to prohibit and penalize the sale of such goods upon the open market and the statute apparently goes no further than this. In any event, for present purposes, we lay that count out of the case, and limit our consideration to the first count. True, the petitioner was found guilty upon both counts, but the penalty imposed upon him does not exceed that which might have been exacted under the first count if it had stood alone. The case, therefore, falls within the rule, frequently stated by this court, that a judgment upon an indictment containing several counts, with a verdict of guilty upon each, will be sustained if any count is good, and sufficient in itself to support the judgment. *Claassen v. United States*, 142 U.S. 140, 146, 12 S.Ct. 169, 35 L.Ed. 966; *Evans v. United States*, 153 U.S. 584, 595, 14 S.Ct. 934, 38 L.Ed. 830; *Abrams v. United States*, 250 U.S. 616, 619, 40 S.Ct. 17, 63 L.Ed. 1173; *Brooks v. United States*, 267 U.S. 432, 441, 45 S.Ct. 345, 69 L.Ed. 699, 37 A.L.R. 1407.

The first count simply charges, in the terms of the statute, that petitioner unlawfully sold on the open market in Ohio certain goods made by prison labor in Alabama. These goods, according to the stipulation of facts, were sold in original packages as they were shipped in interstate commerce into Ohio. When the goods were sold, their transportation had come to an end; and the regulative power of the state had attached, except so far as that power might be affected by the fact that the packages were still unbroken. But any restrictive influence which that fact otherwise might have had upon the state power was completely removed by Congress, if the Hawes-Cooper Act be valid. That act is in substance the same as the Wilson Act with respect to intoxicating liquors, passed August 8, 1890, c. 728, 26 Stat. 313, 27 U.S.C.A. § 121, as construed and upheld by this court. *Rhodes v. Iowa*, 170 U.S. 412, 421-423, 426, 18 S.Ct. 664, 42 L.Ed. 1088; *In re Rahrer*, 140 U.S. 545, 559-560, 562, 564, 11 S.Ct. 865, 35 L.Ed. 572. In effect, both acts provide (the one as construed and the other in terms) that the subject-matter of the interstate shipment shall, upon arrival and delivery in any state or territory, become subject to the operation of the local laws as though produced in such state or territory; and shall not be exempt therefrom because introduced in original packages. Each statute simply permits the jurisdiction of the state to attach immediately upon delivery whether the importation remain in the original

package or not. In other words, the importation is relieved from the operation of any rule which recognizes a right of sale in the unbroken package without state interference—a right the exercise of which never has been regarded as a fundamental part of the interstate transaction, but only as an incident resulting therefrom. *Rhodes v. Iowa*, *supra*, 170 U.S. 412, at pages 420, 423, 424, 18 S.Ct. 664, 42 L.Ed. 1088. The interstate transaction in its fundamental aspect ends upon delivery to the consignee.

The view of the state of Ohio that the sale of convict-made goods in competition with the products of free labor is an evil, finds ample support in fact and in the similar legislation of a preponderant number of the other states. Acts of Congress relating to the subject also recognize the evil. In addition to the Hawes-Cooper Act, the importation of the products of convict labor has been denied the right of entry at the ports of the United States and the importation prohibited. Chapter 497, § 307, 46 Stat. 689, title 19 U.S.C. (1934 Ed.), § 1307, 19 U.S.C.A. § 1307. And the sale to the public in competition with private enterprise of goods made by convicts imprisoned under federal law is forbidden. Chapter 340, § 3, 46 Stat. 391, title 18 U.S.C. (1934 Ed.), § 744c, 18 U.S.C.A. § 744c.

All such legislation, state and federal, proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison. A state basing its legislation upon that conception has the right and power, so far as the Federal Constitution is concerned, by nondiscriminating legislation, to preserve its policy from impairment or defeat, by any means appropriate to the end and not inconsistent with that instrument. The proposition is not contested that the Ohio statute would be unassailable if made to take effect after a sale in the original package. And the statute as it now reads is equally unassailable, since Congress has provided that the particular subjects of interstate commerce here involved “shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case,” *In re Rahrer*, *supra*, 140 U.S. 545, at page 562, 11 S.Ct. 865, 35 L.Ed. 572, namely upon arrival and delivery.

If the power of Congress to remove the impediment to state control presented by the unbroken-package doctrine be limited in any way (a question which we do not now find it necessary to consider), it is clear that the removal of that impediment in the case of prison-made goods must be upheld for reasons akin to those which moved this court to sustain the validity of the Wilson Act. Even without such action by Congress the unbroken-package doctrine, as applied to interstate commerce, has come to be

regarded, generally at least, as more artificial than sound. Indeed, in its relation to that commerce, it was definitely rejected in *Sonneborn Bros. v. Cureton*, 262 U.S. 506, 508, 509, 43 S.Ct. 643, 644, 67 L.Ed. 1095, as affording no immunity from state taxation. "The interstate transportation," this court there concluded, "was at an end, and, whether in the original packages or not, a state tax upon the oil as property or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."

Whether that view of the doctrine as applied to state taxation should now be given a more general application, the Hawes-Cooper Act, being determinative of the case now under review, makes it unnecessary for us to decide.

3. That the Hawes-Cooper Act does not constitute a delegation of Congressional power to the states is made clear by *In re Rahrer*, supra, 140 U.S. 545, at pages 560, 561, 11 S.Ct. 865, 35 L.Ed. 572, and by what we have already said under sub-division 2.

Judgment affirmed.

Mr. Justice VAN DEVANTER, Mr. Justice MCREYNOLDS, and Mr. Justice STONE concur in the result.

#### NOTE

1. See also *Kentucky Whip & Collar Co. v. Ill. Cent. R. Co.*, 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270 (1937), sustaining the Ashurst-Summers Act, 49 U.S.C.A. §§ 61, 62, making it unlawful knowingly to transport in interstate or foreign commerce goods made by convict labor into any state where the goods are intended to be received, possessed, sold or used in violation of its laws. See Dowling and Hubbard, *Divesting an Article of its Interstate Character*, 5 Minn.L.Rev. 100, 253 (1921).

2. This case and the reported case dealt with legislation similar to that formerly enacted to aid states prohibiting the manufacture and sale of intoxicants to effectuate that policy; see *Leisy v. Hardin*, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128 (1890); *In re Rahrer*, 140 U.S. 545, 17 S.Ct. 865, 35 L.Ed. 572 (1891); *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326 (1917); *U. S. v. Hill*, 248 U.S. 420, 39 S.Ct. 143, 63 L.Ed. 337 (1919).

3. U.S.Const., Amend. 21, prohibits the "transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof." For cases discussing the power of states thereunder see *State Board of Equalization of California v. Young's Market*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 125 (1939); *Duckworth v. Arkansas*, 314 U.S. 390, 62 S.Ct. 311, 86 L.Ed. 294 (1941); *Carter v. Virginia*, 321 U.S. 131, 64 S.Ct. 464, 88 L.Ed. 605 (1944). See Note, *The Twenty-First Amendment Versus the Interstate Commerce Clause*, 55 Yale L.Jour. 815 (1946).

## HOOVEN &amp; ALLISON CO. v. EVATT.

Supreme Court of the United States, 1944.  
324 U.S. 652, 65 S.Ct. 870, 89 L.Ed. 1252.

Mr. Chief Justice STONE delivered the opinion of the Court.

Respondent, a tax official of the state of Ohio, has assessed for state ad valorem taxes certain bales of hemp and other fibers belonging to petitioner. The fibers had been brought from the Philippine Islands or from other places outside the United States. When assessed for the tax, they were stored in the original packages in which they had been imported, in petitioner's warehouse at its factory at Xenia, Ohio, preliminary to their use by petitioner in the manufacture of cordage and similar products.

The State Board of Tax Appeals sustained the assessment for the three years in question, 1938, 1939, and 1940. Petitioner then brought the present proceeding in the Supreme Court of Ohio to review the Board's determination. That court rejected petitioner's contention that the fibers are imports, immune from state taxation under Article I, § 10, cl. 2, of the Constitution, which prohibits state taxation of imports or exports; and it sustained the tax. 142 Ohio St. 235, 51 N.E.2d 723.

The State Court recognized that *Brown v. Maryland*, 12 Wheat. 419, 6 L.Ed. 678, established the rule that imports in their original packages may not be taxed by a state. But it thought that the present case fell within the qualification upon that rule laid down in *Waring v. City of Mobile*, 8 Wall. 110, 19 L.Ed. 342. The *Waring* case held that since a purpose of importation is sale, imports are immune from state taxation only so long as they are in the hands of the importer, and lose their immunity upon being sold by him. The Supreme Court of Ohio held that petitioner acquired title to the merchandise here taxed after its arrival in this country. It concluded from this that the foreign sellers or their agents, and not petitioner, were the importers, and that the merchandise, after the sale to petitioner, had ceased to be an import constitutionally immune from state taxation.

In any case the Ohio court thought that even if petitioner were the importer and the merchandise were immune from taxation on its receipt by petitioner, it nevertheless ceased to be an import, and lost its immunity as such, upon its storage at petitioner's warehouse, awaiting its use in manufacturing. The Court thought that *Brown v. Maryland*, *supra*, laid down a rule applicable only to imports for the purpose of sale, and that imports for use became, upon storage, even if still in the original

package, so intermingled with the common mass of property within the state as to be subject to the state power of taxation. The Court found it unnecessary to decide whether the fibers brought from the Philippine Islands, which are not a foreign country, could be imports within the meaning of the constitutional immunity, since they would be taxable in any event upon the two grounds already stated.

We granted certiorari, 321 U.S. 762, 64 S.Ct. 939, because of the novelty and importance of the constitutional questions raised. The questions for decision are (1) whether, with respect to the fibers brought from foreign countries, petitioner was their importer; if so, (2) whether, as stored in petitioner's warehouse, they continued to be imports at the time of the tax assessment; and (3) whether the fibers brought from the Philippine Islands, despite the place of their origin, are likewise imports rendered immune from taxation by the constitutional provision.

The Constitution confers on Congress the power to lay and collect import duties, Art. I, § 8, and provides that "no State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws \* \* \*." Art. I, § 10, Cl. 2. These provisions were intended to confer on the national government the exclusive power to tax importations of goods into the United States. That the constitutional prohibition necessarily extends to state taxation of things imported, after their arrival here and so long as they remain imports, sufficiently appears from the language of the constitutional provision itself and its exposition by Chief Justice Marshall in *Brown v. Maryland*, supra. We do not understand anyone to challenge that rule in this case.

It is obvious that if the states were left free to tax things imported after they are introduced into the country and before they are devoted to the use for which they are imported, the purpose of the constitutional prohibition would be defeated. The fears of the framers, that importation could be subjected to the burden of unequal local taxation by the seaboard, at the expense of the interior states, would be realized, as effectively as though the states had been authorized to lay import duties. It is evident, too, that if the tax immunity of imports, commanded by the Constitution, is to be reconciled with the right of the states to tax goods after their importation has become complete and they have become a part of the common mass of property within a state, "there must be a point of time when the prohibition ceases, and the power of the state to tax commences." *Brown v. Maryland*, supra, 12 Wheat, 441, 6 L.Ed. 678.

In *Brown v. Maryland*, *supra*, the state sought to impose a license tax on the sale by the importer of goods stored in his warehouse in the original packages in which they were imported. In holding the levy to be a prohibited tax on imports, Chief Justice Marshall said (12 Wheat. at pages 441, 442, 6 L.Ed. 678):

"It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution."

Although one Justice dissented in *Brown v. Maryland*, *supra*, from that day to this, this Court has held, without a dissenting voice, that things imported are imports entitled to the immunity conferred by the Constitution; that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported. \* \* \*

All the taxed fibers, with the exception of those brought from the Philippine Islands, which will presently be separately considered, were brought to this country from foreign lands and were undoubtedly imports, clothed as such with a tax immunity which survived their importation, until the happening of some event sufficient to alter their character as imports. As we have said, the Supreme Court of Ohio found such events in what it deemed to be a sale of the merchandise to petitioner after it had been landed in the United States, and in the further circumstance that by storing the merchandise in the warehouse at petitioner's factory, it had become a part of the common mass of property subject to state taxation and so could no longer be regarded as an import.

Resolution of either point in favor of respondent is decisive of the case. Hence we must first consider whether petitioner, rather than the foreign producers or shippers acting through their American agents, was the importer. If so, the tax immunity of the imported merchandise survived its receipt by petitioner and we must determine the further question whether petitioner's subsequent treatment of the merchandise deprived it of its character, and hence its immunity, as an import.

## I.

Petitioner's relationship to the merchandise at the time of importation and afterward is of significance only in determining whether, as the state court has found, the relationship was so altered after importation that it can be said that the purpose of the importation had been fulfilled. If it had, there was no longer either occasion or reason for the further survival of the immunity from taxation. That relationship is to be ascertained by reference to all the circumstances attending the importation, particularly as shown by the long established course of business by which petitioner's supply of fibers has been brought into the country for use in manufacturing its finished product.

The state introduced no evidence, and there is no dispute in point of substance as to petitioner's evidence. The latter consists of the oral testimony of petitioner's general manager, some examples of the contracts by which petitioner procured the merchandise to be brought to this country, and two stipulations containing statements, admitted to be true, which were made by the American agents of the producers and shippers of the merchandise.

Both the Board of Tax Appeals and the state court, without specially finding some of the facts which we regard as of controlling significance, contented themselves with stating the facts generally. They inferred from these facts that petitioner technically was but a purchaser of the merchandise, after it had been imported into this country. They concluded that petitioner was not the importer, and the fibers had ceased to be imports after the sale to petitioner. In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained. \* \* \*

In this case it appears without contradiction that petitioner, in the regular course of its business, contracts for its manufacturing requirements of hemp, jute, sisal and other fibers, before their shipment to this country, and sometimes even before they are produced in the various foreign countries of their origin. Petitioner's negotiations for the purchase are carried on with brokers located in New York City, who represent the for-

oreign producers. After an agreement as to price, petitioner enters into a firm contract to purchase the fibers. A standard form of contract is executed in duplicate or triplicate by petitioner and the broker who signs as agent for or "for account of" his named principal. The contract specifies the kind and amount of fibers purchased, the time of shipment, the American port to which the shipment is to be made, and frequently the steamship company, designated by petitioner, upon whose vessel the merchandise is to be shipped. While the contract gave the seller the option to make deliveries from merchandise warehoused in the United States, no such deliveries were made of any of the merchandise here in question.

The price is a "landed price", which includes as its components the contract cost of the goods at point of origin, the normal charges for ocean freight, marine and war risk insurance and United States customs clearance (including customs duties in the case of hemp which alone of the purchased merchandise is subject to the import duties), and the expense of arranging for transshipment from the port of entry to petitioner at Xenia, Ohio. Any variation from the normal rates for these components (other than the contract cost of the goods at point of origin) is for account of petitioner. "Extra value" insurance covering any increase in value of the merchandise over the contract price during the voyage, is effected, if petitioner requests, at its expense.

Upon shipment the merchandise is consigned to the broker in this country or to a banker, either on an order or a straight bill of lading, in either case with directions to "Notify The Hooven & Allison Co." When the bales of purchased merchandise are loaded for shipment on board vessel at the point of origin, they are given distinctive markings referable to petitioner's contract. A declaration is then cabled to the New York broker referring to the contract upon which the shipment is made, stating the name of the vessel, the approximate number of bales shipped, their identification marks, and the approximate date of arrival in the United States. The broker communicates this information to petitioner and sometimes follows it before arrival of the shipment at the port of entry, with a pro forma invoice, which states the approximate tonnage and value of the shipment. Petitioner then gives instructions to the broker for the shipment from the port to Xenia.

The broker enters the shipment at the custom house in its own name as an accommodation to the petitioner, which has no facilities for clearance of the goods through the customs. The broker then ships the merchandise upon a straight bill of lading

to Xenia, where it is delivered by the carrier to petitioner. At that time petitioner pays the freight, and ten to fifteen days after the receipt of the final invoice, it pays the purchase price to the broker. It is stipulated that the sale is upon the unsecured credit of petitioner and it does not appear that there is any retention of a security title either by the foreign seller, the broker, or any intervening banker, to secure payment by petitioner of the purchase price.

From all this it is clear that from the beginning, after the contract of purchase is signed, the foreign producer is obligated to sell the merchandise on credit, to ship it to an American port and to deliver it to petitioner, which is obligated to accept and pay for it. Performance of the contract calls for, and necessarily results in, importation of the merchandise from its country of origin to the United States. Petitioner's contracts of purchase are the inducing and efficient cause of bringing the merchandise into the country, which is importation. Examination of the documents and consideration of the course of business can leave no doubt that the petitioner not only causes the importation but that the purpose and necessary consequence of it are to supply petitioner with the raw material for its manufacture of cordage at its factory in Ohio.

From the moment of shipment the taxed merchandise was identified and appropriated to the purchase contract and to that ultimate purpose, by both the seller and the buyer. Petitioner could resell the merchandise while it was in transit. The risk of loss from change in market value was on petitioner, save as it might insure against such loss at its own expense. The right to demand, receive and use the merchandise, subject only to the payment of the contract "landed price", was in petitioner. And obviously if the possibility of the seller's right of stoppage in transitu, the carrier's lien or the necessity of payment of customs duties are to be regarded as inconsistent with importation, there would be few importations and few importers in the constitutional sense. For there are few who are not subject to some or all of these contingencies.

Here it is agreed that the sale was on credit. So far as appears in those instances where the merchandise was consigned to a banker, it was for the purpose of financing the producer or shipper, pending receipt of the merchandise and payment for it by petitioner, which appears always to have purchased on credit and to have received the merchandise before payment, and never to have given security for its payment. There was therefore no occasion for an implied reservation of a security "title" as against petitioner in either the sellers or their agents, or the banker in those cases where the goods were consigned on shipment to a banker.

For the purpose of determining whether petitioner was the importer in the constitutional sense, it is immaterial whether the title to the merchandise imported vested in him who caused it to be brought to this country at the time of shipment or only after its arrival here. Decision in *Waring v. City of Mobile* supra, upon which the Supreme Court of Ohio relied, did not turn on technical questions of passage of title. For in determining the meaning and application of the constitutional provision, we are concerned with matters of substance not of form. When the merchandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected. It is common knowledge to lawyers and businessmen that vast quantities of merchandise are annually imported into this country by purchasers resident here, for sale or manufacture here. Sometimes the buyer completes the purchase abroad, in person, and ships to this country; sometimes, as in this case, the purchase is on unsecured credit, but more often it is under contracts by which the vendor reserves in himself or his agent or a banker a lien or title as security for payment of the purchase price on or after arrival. To say that the purchaser is any the less an importer in the one case than in the others, is to ignore the constitutional purpose and substitute form for substance.

As we have said, the constitutional purpose is to protect the exclusive power of the national government to tax imports and to prevent what in matter of substance would amount to the imposition of additional import duties by states in which the property might be found or stored before its sale or use. It is evident that the constitutional prohibition envisages the present transaction, quite as much as if the petitioner had sent his own agent abroad where he had purchased and paid for the merchandise and shipped it to petitioner in this country. The purpose and result of the transaction are the same in either case. The apprehended evils of the local taxation of imports after their arrival here are the same.

It is enough for present purposes that the merchandise in this case was imported; and that petitioner was the efficient cause of its importation, the purpose and effect of which was petitioner's acquisition of the merchandise for its manufacture into finished goods. We conclude that petitioner was the importer, and that the merchandise in its hands was entitled to the constitutional tax immunity, surviving delivery of the imports to it.

## II.

We turn now to the question whether the immunity was lost by the storage of the merchandise in the original packages in petitioner's warehouse at its factory, pending its use in petitioner's manufacturing operations. For the purpose of the immunity it has not been thought, nor is there reason for supposing, that it matters whether the imported merchandise is stored in the original package in the importer's warehouse at the port of entry or in an interior state. The reason for the original package doctrine, as fully expounded in *Brown v. Maryland*, *supra*, is that unless the immunity survives to some extent the arrival of the merchandise in the United States, the immunity itself would be destroyed. For there is no purpose of taxing importation, itself, even its ultimate suppression, which could not be equally accomplished by laying a like tax on things imported after their arrival and while they are in the hands of the importer.

On the other hand the immunity is adequately protected and the state power to tax is adequately safeguarded if, as has been the case ever since *Brown v. Maryland*, *supra*, an import is deemed to retain its character as such "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported," see *Brown v. Maryland*, *supra*, 12 Wheat. 442, 6 L.Ed. 678, or until put to the use for which it was imported. Chief Justice Marshall, in *Brown v. Maryland*, *supra*, 12 Wheat. at pages 442, 443, 6 L.Ed. 678, rejected the suggestion that "an importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation." Plainly if and when removed from the package in which they are imported or when used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end. It is quite another matter to say, and Chief Justice Marshall did not say, that because they may be taxed when used, the importer may not hold them tax free until the original packages are broken or until they are put to the use for which they are imported. He said, 12 Wheat. at page 443, 6 L.Ed. 678: "The same observations [i.e., the importer has mixed the goods with the common mass of property, rendering them taxable] apply to plate, or other furniture *used* by the importer." (*Italics added.*)

We have often indicated the difference in this respect between the local taxation of imports in the original package and the like taxation of goods, either before or after their shipment in interstate commerce. In the one case the immunity derives from the prohibition upon taxation of the imported merchandise

itself. In the other the immunity is only from such local regulation by taxation, as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not. The regulatory effect of a tax, otherwise permissible, is not in general affected by retention of the merchandise in the original package in which it has been transported. \* \* \*

This Court has pointed out on several occasions that imports for manufacture cease to be such and lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported, \* \* \* or when the original packages in which they were imported are broken. \* \* \* But no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation. On the contrary, Chief Justice Taney, in affirming the doctrine of *Brown v. Maryland*, in which he appeared as counsel for the State, declared, as we now affirm: "Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government." *License Cases*, 5 How. 504, 575, 12 L.Ed. 256.

In *Brown v. Maryland*, *supra*, the imported merchandise held in original packages in the importer's warehouse for sale, was deemed tax immune. We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports any sooner or more readily than imports for sale. The constitutional necessity that the immunity, if it is to be preserved at all, survive the landing of the merchandise in the United States and continue until a point is reached, capable of practical determination, when it can fairly be said that it has become a part of the mass of taxable property within a state, is the same in both cases.

It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a

manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question.

It is said that our decision will result in discrimination against domestic and in favor of foreign producers of goods. But such discriminations as there may be, are implicit in the constitutional provision and in its purpose to protect imports from state taxation. It is also suggested that it will be difficult to ascertain in particular cases when an original package is broken, a difficulty which arises, not out of the present decision, but out of the original package rule itself, which we do not understand to be challenged here. Moreover, this supposed difficulty does not seem to have baffled judicial decision in any case in the more than a hundred years which have followed the decision in *Brown v. Maryland*, supra.

As was emphasized in *Brown v. Maryland*, supra, the reconciliation of the competing demands of the constitutional immunity and of the state's power to tax, is an extremely practical matter. In view of the fact that the Constitution gives Congress authority to consent to state taxation of imports and hence to lay down its own test for determining when the immunity ends, we see no convincing practical reason for abandoning the test which has been applied for more than a century, or why, if we are to retain it in the case of imports for sale, we should reject it in the case of imports for manufacture. Unless we are to ignore the constitutional prohibition we cannot say that imports for manufacture are not entitled to the immunity which the Constitution commands, and we see no theoretical or practical grounds for saying, more than in the case of goods imported for sale, that the immunity ends while they are in the original package and before they are devoted to the purpose for which they were imported. \* \* \*

Reversed.

#### NOTE

1. The "original package doctrine" as a limit on the taxing power of the states was first developed in *Brown v. Maryland*, 12 Wheat. 419, 6 L.Ed. 678 (1827). As to when property is deemed incorporated with the general mass of property within the state, see *May & Co. v. New Orleans*, 178 U.S. 496, 20 S.Ct. 976, 44 L.Ed. 765 (1900); *Southern Pac. Co. v. Callexico*, 288 F. 634 (D.C.Cal.1923); *Gulf Fisheries Co. v. MacInerney*, 276 U.S. 124, 48 S.Ct. 227, 72 L.Ed. 495 (1928).

2. The doctrine was never applied to prevent state property taxes on interstate imports, *Woodruff v. Parham*, 8 Wall. 123, 19 L.Ed. 382 (1869). Once deemed a limit on state excises on sales of interstate imports, *Askren v. Continental Oil Co.*, 252 U.S. 444, 40 S.Ct. 355, 64 L.Ed. 654 (1920); *Bowman v. Continental Oil Co.*, 256 U.S. 642, 41 S.Ct. 606, 65 L.Ed. 1139 (1921); it is no longer so held, *Texas Co. v. Brown*, 258 U.S. 466, 42 S.Ct. 375, 66 L.Ed. 721 (1922); *Sonneborn Bros. v. Cureton*, 262 U.S. 506, 43 S.Ct. 643, 67 L.Ed. 1095 (1923).

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### INDEPENDENT WAREHOUSES, Inc. v. SCHEELE.

Supreme Court of the United States, 1947.

331 U.S. 70, 67 S.Ct. 1062, 91 L.Ed. 1346.

Mr. Justice RUTLEDGE delivered the opinion of the Court.

An ordinance of Saddle River Township, New Jersey, forbids carrying on the business of storing goods for hire except upon the payment of an annual license tax. Independent Warehouses, Inc., and Thompson, an agent of that company, have been convicted and fined for conducting such a business without procuring the license or paying the tax. The convictions have been sustained by New Jersey's highest court. The appeal here seeks to have that judgment reversed on the basis that the business done was exclusively interstate and consequently the application made of the ordinance contravenes the commerce clause of the Federal Constitution, Art. I, § 8. Fourteenth Amendment objections also are raised.

The main thrust of the argument has been toward the commerce clause phase of the case. In this the controversy is of the familiar "interruption" or "cessation" type. The issue accordingly requires only a determination of the proper application to be made of well-established legal principles to the particular circumstances. It is whether the cessation taking place in the movement of goods interstate, as shown by the record, is of a nature which permits the state or a municipality to tax the goods or services, here the business of storing them, rendered in connection with their handling.

The governing principles were stated in *State of Minnesota v. Blasius*, 290 U.S. 1, 9, 10, 54 S.Ct. 34, 36, 78 L.Ed. 131, as follows:

"\* \* \* the states may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to a rest within a state and become subject to the power of the state to impose a non-discriminatory property tax. Such an exertion of state power belongs to that class

of cases in which, by virtue of the nature and importance of local concerns, the state may act until Congress, if it has paramount authority over the subject, substitutes its own regulations. The 'crucial question,' in determining whether the state's taxing power may thus be exerted, is that of 'continuity of transit.' *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 101, 49 S.Ct. 292, 293, 73 L.Ed. 626.

"If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the state's power to tax it. \* \* \* If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement. \* \* \* Formalities, such as the forms of billing, and mere changes in the method of transportation, do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. \* \* \*

"Where property has come to rest within a state, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the state, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the state and is thus subject to its taxing power."

Since the circumstances characterizing the interruption are of controlling importance, we turn to the details of the movement and of the stoppage shown by the record.

## I.

The suit is the culmination of a controversy extending back to 1939, with earlier litigious chapters in the state and federal courts. It grows out of the operation of facilities for storing and handling coal under various arrangements between the Erie Railroad Company and other corporations affiliated for this and other enterprises by stock ownership or by contract.

The Pennsylvania Coal Company is a wholly owned subsidiary of Erie. It owns and operates coal mines in Pennsylvania. In 1901 it acquired 67.25 acres of land in Saddle River Township, New Jersey. This acreage and its facilities, known as Coalberg, are located on the New York, Susquehanna and Western Railroad and perform functions connected with that road's operations not material to this cause. Coalberg also is connected directly with the Bergen County Railroad, a freight cutoff of Erie. Its

chief purpose, and the only one relevant to this controversy, is to provide storage for coal shipped in from the Coal Company's Pennsylvania mines and later shipped out to various destinations.

Prior to 1939, Coalberg was operated by the Coal Company or its lessees as a private business, not as a public utility. During this time the Township levied personal property taxes upon the coal in storage, assessing and collecting them from its owners. These were, as they are now, chiefly coal distributors using Coalberg's storage facilities, principally because of their accessibility to distributing centers, especially in the vicinity of New York City, and to shipping facilities both by rail and by water.

In 1939, however, by arrangements to be set forth involving Erie, the Coal Company and Independent Warehouses, Coalberg was converted into a public utility to serve shippers of coal on Erie lines. Under New Jersey law, goods stored in warehouses conducted for hire are exempted from personal property taxes. Rev.Stat.N.J. § 54:4-3.20, N.J.S.A. The Township, despite the change in Coalberg's mode of operation, continued to levy such taxes on the stored coal until the 1940 assessment was invalidated in the state courts. *Pattison & Bowns, Inc., v. Saddle River Township*, 129 N.J.L. 135, 28 A.2d 485; *Id.*, 130 N.J.L. 177, 32 A.2d 363.

The municipality's resulting loss in revenue amounted to about eight per cent of the total collected for local, county and state purposes. To make up for this, as its brief here candidly admits, the Township enacted the ordinance now in question, acting under other provisions of state law. N.J.Stat.Ann. §§ 40:52-1, 40:52-2. The effect was to shift the direct incidence of the tax from the owners of the coal i. e., the shipper-distributors, to the operator of the storage business and to change its character from a direct property tax to that of a license or franchise tax for the privilege of conducting that business in the state. The amount of revenue thus produced, though in dispute, substantially will repair the loss suffered from invalidation of the property tax. This suit is the outgrowth of the Township's effort to enforce the new taxing provisions.

It is necessary to state in some detail the arrangements made in 1939 by which the change was brought about in the mode of operating Coalberg. An agreement then made between the Coal Company and Erie provides that the former shall operate Coalberg "as a public service facility for shippers of prepared anthracite coal on Erie lines desiring storage space in accordance with and under the rates named in a certain Tariff on file with the Interstate Commerce Commission and the Public Utilities Com-

mission of the State of New Jersey. \* \* \*” The agreement recites that it is made in view of the considerations that the Coal Company has no need for Coalberg’s storage facilities and that they are of use to Erie in affording “facilities for the storage of prepared anthracite coal for shippers on Erie lines whereon said Coalberg Storage Yard is located so that shipments of coal may not be diverted to other and competing lines on which facilities for coal storage are available. \* \* \*” Erie pays the net monthly loss, if any, of operating the yard and the Coal Company remits to Erie the net monthly surplus, if any. Erie also undertakes to maintain an agent at Coalberg duly authorized on its behalf to issue warehouse receipts for coal placed in storage by shippers.

The Coal Company has discharged the operating function under its agreement with Erie by an arrangement also made in 1939 with Independent Warehouses, which is a New York corporation engaged in the warehousing business. The Coal Company leased Coalberg to Independent Warehouses for \$1.00 a year and the latter undertook to operate the plant for a consideration which now amounts to approximately \$500 a year. The agreement between the Coal Company and Erie governs the manner of Coalberg’s operation by Independent Warehouses.

Under these arrangements purchasers from the Coal Company who ship coal from the mines designate the destination on the shipping papers. If they designate Coalberg, the coal is sent there on railroad cars. It is unloaded to the storage pile where it is kept until ordered out by the owner. It is then reloaded into railroad cars, and when it is reshipped there is a new billing to the new destination. Most of the coal, after it has been stored, goes to states other than New Jersey. Some, however, is marketed in New Jersey. It is disputed whether there is any local distribution in the Township, but if so the amount is comparatively insignificant.

The financial arrangements under the governing tariff are as follows. On arrival of the shipments at Coalberg the transportation charges on the movement from the mine to Coalberg are paid to the Erie freight agent at Coalberg. When the coal is moved again after storage, the remainder of the through tariff rate from the point of original shipment at the mine in Pennsylvania is paid. This arrangement is known as the transit privilege. “The privilege of transit enables grain [here coal] to be shipped from point A to point B, there to be stored, marketed, or processed, and later reshipped to point C at a rate less than the combination of the separate rates from A to B and B to C.” Board of Trade of Kansas City, Mo., v. United States,

314 U.S. 534, 537, 538, 62 S.Ct. 366, 368, 86 L.Ed. 432, and authorities cited.

The storage facilities given to shippers are free for a period of two years, although a charge is made by Erie for unloading the cars into the stock pile and for reloading the cars for reshipment. A charge is also made by Independent Warehouses upon such coal owners as obtain warehouse receipts from it.

The licensing ordinance applied in this case was adopted in 1943, following upon the New Jersey decision in *Pattison & Bowns, Inc., v. Saddle River Township*, *supra*. The ordinance provides:

"No person, firm or corporation shall conduct or carry on the business of the storage of personal property in a warehouse engaged in storing goods for hire or work in, occupy, or, directly, or indirectly in any manner whatsoever, utilize any place or premises in which is conducted or carried on the storage of personal property in a warehouse engaged in the business of storing goods for hire, unless and until there shall be granted by the Township Committee of the Township of Saddle River in accordance with the terms of this ordinance and shall be in force and effect, a license to conduct said business for the place and premises in or at which said business shall be conducted and carried on." The ordinance specifies that for the license there shall be charged and collected in advance an annual fee of three-quarters of a cent for each square foot of ground in the Township where the business is carried on. There is also a penalty clause, in addition to other provisions not now pertinent. \* \* \*

That the storage of the coal is part of a transit privilege does not in itself sustain appellants' claim that the interstate movement had not stopped sufficiently for the state's taxing power to attach when the coal reached and was stored in Coalberg. Cf. *State of Minnesota v. Blasius*, *supra*; *Bacon v. People of State of Illinois*, 227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615. It has long been recognized that transit privileges rest "upon the fiction that the incoming and the outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination." \* \* \* Of course this fiction, which may be desirable for ratemaking or other purposes, cannot control the power of a state or municipality to tax activities properly subject to exercise of that power apart from the fiction's application to them.

Indeed, the facts of this case demonstrate that here at least the fiction is complete. They show that the journey of the coal from the Pennsylvania mines to Coalberg and the subsequent journeys upon leaving Coalberg were not parts of a "continuity of transit"

in the sense held by this Court's previous decisions to preclude a valid exercise of the states' taxing or regulatory powers. See, e. g., *Pittsburg & Southern Coal Co. v. Bates*, 156 U.S. 577, 15 S.Ct. 415, 39 L.Ed. 538; *General Oil Co. v. Crain*, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754; *Bacon v. People of State of Illinois*, supra; *Susquehanna Coal Co. v. City of South Amboy*, 228 U.S. 665, 33 S.Ct. 712, 57 L.Ed. 1015.

A characteristic feature of those cases in which the state has been allowed to tax property which has come to rest after an interstate journey is that at the time the tax is laid it cannot be determined what the ultimate destination or use of the property may be. Thus in *General Oil Co. v. Crain*, supra, the oil was shipped to Memphis and held there until required to supply orders from out-of-state customers. In *Brown v. Houston*, 114 U.S. 622, 5 S.Ct. 1091, 29 L.Ed. 257, coal sent from Pennsylvania to New Orleans was held taxable in Louisiana because, although some of it was subsequently exported, it "was being held for sale to any one who might wish to buy." *Champlain Realty Co. v. City of Brattleboro*, 260 U.S. 366, 376, 43 S.Ct. 146, 67 L.Ed. 309, 25 A.L.R. 1195. In *Bacon v. People of State of Illinois*, supra, the grain sent to Bacon's elevator was at his complete disposal. "He might sell the grain in Illinois or forward it, as he saw fit." Although his intention was to forward it after inspection, grading, etc., this purpose was held irrelevant. 227 U.S. at page 516, 33 S.Ct. at page 303, 57 L.Ed. 615. And in *Susquehanna Coal Co. v. City of South Amboy*, supra, although there was an anticipation of orders for the coal unloaded at South Amboy, yet there were no actual orders from customers. \* \* \*

Those cases are indistinguishable from this one as to the facts and the effect of the stoppage. Once the coal has reached Coalberg, no one can determine, without receiving an order from the owner, to what point or person it finally will be sent or to what use it will be put. Indeed, at the actual time of storage, even the owner may not know where the coal will go next, for the very purpose of the storage is in part to meet seasonal demand. And while the form of billing is not conclusive, *State of Minnesota v. Blasius*, supra, the fact that the coal is billed to Coalberg and is not rebilled until the owner asks that it be released from storage further shows that the final destination is not known by the owner or by others.

Moreover, in all these cases the duration of the cessation of transit is indefinite and in this case may extend as long as two years without loss of transit privilege. Indeed, except for that loss it may extend indefinitely, since under the controlling tariff

Erie does not require, but only reserves the right to require, removal at the end of two years. It is also significant that invariably the goods are fungibles, a fact pointing up the fictional basis of the intransit privilege. The goods which are sent initially into the interstate commerce stream are not the identical goods which finally arrive at the place of consumption.

In view of all these considerations, the case falls more appropriately in the category allowing the state's taxing power to apply, than in the one denying its applicability. The interruption hardly can be held to be "due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement," *State of Minnesota v. Blasius*, 290 U.S. at pages 9, 10, 54 S.Ct. at page 37, 78 L.Ed. 131, broad as may be the latitude given for such incidents of transit. More is involved here than stopping to take advantage of such latitudes. The case therefore is one, again in the language of the *Blasius* case, "where property has come to rest within a state, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the state, or for shipment elsewhere, as his interest dictates \* \* \*." 290 U.S. at page 10, 54 S.Ct. at page 37, 78 L.Ed. 131.

The facts bring the case exactly within this description, although the record shows that most of the coal after storage goes to other states and little, if any, is distributed locally at Coalberg. Not what ultimately happens to the goods or where they finally go, but the occasion and purpose of the interruption are controlling. "The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied." *State of Minnesota v. Blasius*, 290 U.S. at page 10, 54 S.Ct. at page 37, 78 L.Ed. 131.

Here the cessation takes place not simply for the carrier's transit reasons relating to the necessities or convenience of the journey, but for reasons primarily concerned with the owner's business interests. As in the *Bacon and Susquehanna Coal* cases, *supra*, he is entirely free to keep or market the goods in New Jersey or to send them elsewhere. Marketing considerations primarily, and it may be exclusively, determine this choice and many or all of the controlling factors may not arise until after the coal has reached Coalberg or indeed many months later.

The situation in this respect is not materially different from those involved in the *Susquehanna Coal*, *Bacon*, and other cases cited, or indeed from one in which a coal distributor might place his storage facilities at some distance from his place of market, as at a near-by way station, in order to reduce the cost of his

storage operations. That reasons of economy and convenience or even of necessity arising from the absence or prohibitive cost of storage space at the immediate point of distribution might lead him thus to locate his storage operations, and thereby incur the necessity and expense of hauling the goods from storage to market, hardly could be held to make the interruption an incident of transit rather than one of his own business policy and interest. That he may secure the same advantages by using the storage facilities of others for like purposes, rather than his own, does not change the result. In neither case does the arrangement defeat the state's power to tax his property so located or his business thus conducted.

Moreover, as has been noted, some of the coal remains in New Jersey, being shipped out from Coalberg as the shipper directs. As to this all interstate transportation has ended. The fact that the owner elects to take advantage of Coalberg's storage facilities for conducting his storage operations rather than his own located at the point or points of final distribution in New Jersey, whether near to Coalberg or at some distance, does not make the final wholly intrastate movement between those points a leg of the initial interstate movement begun at the mine.

As for the coal moving out of Coalberg interstate, the fact that this movement crosses a state line makes it of course an interstate movement. But this does not make it part of a continuous journey beginning at the mine and ending in the second state of destination. Indeed, not until after the storage has taken place is it determined or can it be known whether this coal will move out of Coalberg interstate or intrastate. And this is because it cannot be known before that time whether the owner's interest, disconnected from the ordinary and usual incidents of transportation, will dictate one market or use rather than another. Interruptions thus governed cannot be classified as interruptions merely incident to transit or dictated by its necessities or convenience.

The 1939 change in Coalberg's mode of operation did not alter in any substantial way the character, duration or purpose of the stoppage. Since then as before, the primary reasons dictating the shippers' action in taking advantage of it are their business reasons rather than transit reasons as such. Accordingly the state's power to tax the goods stored could not be affected by that change. That the state has chosen to discontinue exercising it as a matter of state taxing policy can make no difference in this respect. Nor can this fact, or the change in method of operation, defeat the state's power to tax the business of furnishing the facilities for storage, since that business also becomes local or interstate depending upon the purposes

of the stoppage, whether for transit reasons or chiefly for non-transit ones.

The authorities above cited, it is true, generally involved property taxes levied upon the stored coal. But their controlling principle applies equally to franchise or other taxes upon the business of furnishing the storage facilities. Cf. *General Oil Co. v. Crain*, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754; *American Steel & Wire Co. v. Speed*, 192 U.S. 500, 24 S.Ct. 365, 48 L.Ed. 538. It would be an impermissible anomaly to hold that the goods stored may be taxed, because the interruption of transit is for nontransit purposes, but that the business of furnishing the facilities for storing them is not affected or governed legally by the same purposes, for applying the state's powers of taxation.

Accordingly, the case is governed by the prior decisions allowing states and municipalities to tax in situations of this sort. It follows that the tax is not forbidden because it is part of a licensing measure. Even where it is undisputed that the commerce is exclusively interstate in nature, "not the mere fact or form of licensing, but what the license stands for by way of regulation is important." \* \* Nor does anything in the Interstate Commerce Act, 49 U.S.C.A. § 1 et seq. forbid local taxation where it is otherwise permissible. The tax therefore is valid under the commerce clause. \* \* \*

The judgment is affirmed.

#### NOTE

1. For interesting factual situation involving issue whether oil was moving in foreign commerce, see *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 49 S.Ct. 292, 73 L.Ed. 626 (1929). See T. R. Powell, *Taxation of Things in Transit*, 7 Va.L.Rev. 167, 245, 429, 497 (1921).

2. The invalidity of state property taxes on property moving in interstate or foreign commerce discussed in the reported case, does not extend to property used within a state in such commerce, *Adams Express Co. v. Ohio*, 165 U.S. 194, 17 S.Ct. 305, 41 L.Ed. 683 (1897). This has raised difficult questions under both the commerce clause and the due process clause of U.S.Const. Amend. 14, when the property taxed was the rolling stock of railroads or airplanes. These are exhaustively discussed in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283 (1944). One method frequently used to determine the amount of the taxable property within a state is the "unit rule" which is valid if the proper unit is selected and a proper allocation formula is used to determine the property taxable by the state; see *Fargo v. Hart*, 193 U.S. 490, 24 S.Ct. 498, 48 L.Ed. 761 (1904); *Wallace v. Hines*, 253 U.S. 66, 40 S.Ct. 435, 64 L.Ed. 782 (1920).

3. The Supreme Court has sustained state taxation of property used within a state in interstate commerce by taxing the gross earnings therefrom, including a pro-rated portion of the gross earnings from interstate commerce, *U. S. Express Co. v. Minnesota*, 223 U.S. 335, 32 S.Ct. 211, 56 L.Ed. 459 (1912); *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 38 S.Ct. 373, 62 L.Ed. 827 (1918); cf. *New Jersey Bell Tel. Co. v. State Board of Taxes*, 280 U.S. 338, 50 S.Ct. 111, 74 L.Ed. 463 (1929).

4. See for general discussion of limitations imposed on the taxing power of the states by the commerce clause, J. M. Landis, *The Commerce Clause as a Restriction on State Taxation*, 20 Mich.L.Rev. 50 (1921); J. R. Hellenstein and E. B. Hennefeld, *State Taxation in a National Economy*, 54 Harv.L.Rev. 949 (1941).

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### WESTERN LIVE STOCK v. BUREAU OF REVENUE.

Supreme Court of the United States, 1938. 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944.

Mr. Justice STONE delivered the opinion of the Court.

Section 201, chapter 7, of the New Mexico Special Session Laws of 1934, levies a privilege tax upon the gross receipts of those engaged in certain specified businesses. Subdivision I imposes a tax of 2 per cent. of amounts received from the sale of advertising space by one engaged in the business of publishing newspapers or magazines. The question for decision is whether the tax laid under this statute on appellants, who sell without the state, to advertisers there, space in a journal which they publish in New Mexico and circulate to subscribers within and without the state, imposes an unconstitutional burden on interstate commerce.

Appellants brought the present suit in the state district court to recover the tax, which they had paid under protest, as exacted in violation of the commerce clause of the Federal Constitution. U.S.C.A.Const. art. 1, § 8, cl. 3. The trial court overruled a demurrer to the complaint and gave judgment for appellants, which the Supreme Court reversed. 41 N.M. 141, 65 P.2d 863. Appellants refusing to plead further, the district court gave judgment for the appellees, which the Supreme Court affirmed. 41 N.M. 288, 67 P.2d 505. The case comes here on appeal from the second judgment under section 237 of the Judicial Code, as amended, 28 U.S.C.A. § 344.

Appellants publish a monthly livestock trade journal which they wholly prepare, edit, and publish within the state of New Mexico, where their only office and place of business is located. The journal has a circulation in New Mexico and other states, being distributed to paid subscribers through the mails or by other means of transportation. It carries advertisements, some

of which are obtained from advertisers in other states through appellants' solicitation there. Where such contracts are entered into, payment is made by remittances to appellants sent interstate; and the contracts contemplate and provide for the interstate shipment by the advertisers to appellants of advertising cuts, mats, information, and copy. Payment is due after the printing of such advertisements in the journal and its ultimate circulation and distribution, which is alleged to be in New Mexico and other states.

Appellants insist here, as they did in the state courts, that the sums earned under the advertising contracts are immune from the tax because the contracts are entered into by transactions across state lines and result in the like transmission of advertising materials by advertisers to appellants, and also because performance involves the mailing or other distribution of appellants' magazines to points without the state.

That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question. *Paul v. Virginia*, 8 Wall. 168, 19 L.Ed. 357; *Hooper v. California*, 155 U.S. 648, 15 S.Ct. 207, 39 L.Ed. 297; *New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 34 S.Ct. 167, 58 L.Ed. 332. Cf. *Ware & Leland v. Mobile County*, 209 U.S. 405, 28 S.Ct. 526, 52 L.Ed. 855, 14 Ann.Cas. 1031; *Engel v. O'Malley*, 219 U.S. 128, 31 S.Ct. 190, 55 L.Ed. 128. Hence it is unnecessary to consider the impact of the tax upon the advertising contracts except as it affects their performance, presently to be discussed. Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business. *Williams v. Fears*, 179 U.S. 270, 21 S.Ct. 128, 45 L.Ed. 186; *Ware & Leland v. Mobile County*, *supra*; *Browning v. Waycross*, 233 U.S. 16, 34 S.Ct. 578, 58 L.Ed. 828; *General Railway Signal Co. v. Virginia*, 246 U.S. 500, 510, 38 S.Ct. 360, 62 L.Ed. 854; *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038. Here the tax which is laid on the compensation received under the contract is not forbidden either because the contract, apart from its performance, is within the protection of the commerce clause, or because as an incident preliminary to printing and publishing the advertisements the advertisers send cuts, copy and the like to appellants.

We turn to the other and more vexed question, whether the tax is invalid because the performance of the contract, for which the compensation is paid, involves to some extent the distribution, interstate, of some copies of the magazine containing the advertisements. We lay to one side the fact that appellants do not allege specifically that the contract stipulates that the advertisements shall be sent to subscribers out of the state, or is so framed that the compensation would not be earned if subscribers outside the state should cancel their subscriptions. We assume the point in appellants' favor and address ourselves to their argument that the present tax infringes the commerce clause because it is measured by gross receipts which are to some extent augmented by appellants' maintenance of an interstate circulation of their magazine.

It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. "Even interstate business must pay its way," *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252, 259, 39 S.Ct. 265, 266, 63 L.Ed. 590; *Ficklen v. Shelby County Taxing District*, 145 U.S. 1, 24, 12 S.Ct. 810, 36 L.Ed. 601; *Postal Telegraph Cable Co. v. Adams*, 155 U.S. 688, 696, 15 S.Ct. 268, 360, 39 L. Ed. 311; *Galveston, H. & S. A. R. Co. v. Texas*, 210 U.S. 217, 225, 227, 28 S.Ct. 638, 52 L.Ed. 1031, and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce, *Western Union Telegraph Co. v. Massachusetts*, 125 U.S. 530, 8 S.Ct. 961, 31 L.Ed. 790; *Cleveland, C., C. & St. L. R. Co. v. Backus*, 154 U.S. 439, 14 S.Ct. 1122, 38 L.Ed. 1041; *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 17 S.Ct. 305, 41 L.Ed. 683; *Adams Express Co. v. Kentucky*, 166 U.S. 171, 17 S.Ct. 527, 41 L.Ed. 960; *Western Union Tel. Co. v. Missouri ex rel. Gottlieb*, 190 U.S. 412, 23 S.Ct. 730, 47 L.Ed. 1116; *Old Dominion S. S. Co. v. Virginia*, 198 U.S. 299, 25 S.Ct. 686, 49 L.Ed. 1059, and if the property devoted to interstate transportation is used both within and without the state, a tax fairly apportioned to its use within the state will be sustained, *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613; *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 38 S.Ct. 373, 62 L.Ed. 827. Net earnings from interstate commerce are subject to income tax, *United States Glue Co. v. Oak Creek*, 247 U.S. 321, 38 S.Ct. 499, 62 L.Ed. 1135, *Ann.Cas.*1918E, 748, and, if the commerce is carried on by a corporation, a franchise tax may be imposed, measured by the

net income from business done within the state, including such portion of the income derived from interstate commerce as may be justly attributable to business done within the state by a fair method of apportionment. *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165. Cf. *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission*, 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282.

All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed, *Fargo v. Stevens*, Michigan, 121 U.S. 230, 7 S.Ct. 857, 30 L.Ed. 888; *Philadelphia & S. M. S. S. Co. v. Pennsylvania*, 122 U.S. 326, 7 S.Ct. 1118, 30 L.Ed. 1200; *Galveston, H. & S. A. R. Co. v. Texas*, supra; *Meyer v. Wells, Fargo & Co.*, 223 U.S. 298, 32 S.Ct. 218, 56 L.Ed. 445, or added to, *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 38 S.Ct. 126, 62 L.Ed. 295; *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956, with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. See *Philadelphia & S. M. S. S. Co. v. Pennsylvania*, supra, 122 U.S. 326, 346, 7 S.Ct. 1118, 30 L.Ed. 1200; *State Freight Tax*, 15 Wall. 232, 280, 21 L.Ed. 146; *Bradley, J.*, dissenting in *Maine v. Grand Trunk Railway Co.*, 142 U.S. 217, 235, 12 S.Ct. 121, 163, 35 L.Ed. 994. Cf. *Pullman's Palace-Car Co. v. Pennsylvania*, supra, 141 U.S. 18, 26, 11 S.Ct. 876, 35 L.Ed. 613. The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. *Baldwin v. G. A. F. Seelig*, 294 U.S. 511, 523, 55 S.Ct. 497, 500, 79 L.Ed. 1032, 101 A.L.R. 55.

It is for these reasons that a state may not lay a tax measured by the amount of merchandise carried in interstate commerce, *State Freight Tax*, supra, or upon the freight earned by its carriage, *Fargo v. Michigan*, supra; *Philadelphia & S. M. S. S. Co. v. Pennsylvania*, supra, restricting the effect of *State Tax on Railway Gross Receipts*, 15 Wall. 284, with which compare *Miller, J.*, dissenting in that case at page 297, 21 L.Ed. 164. Taxation

measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, *Wisconsin & M. R. Co. v. Powers*, 191 U.S. 379, 24 S.Ct. 107, 48 L.Ed. 229; *Maine v. Grand Trunk Railway*, supra; *Cudahy Packing Co. v. Minnesota*, supra; *United States Express Co. v. Minnesota*, 223 U.S. 335, 32 S.Ct. 211, 56 L.Ed. 459, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair; *Fargo v. Michigan*, supra; *Galveston, H. & S. A. R. Co. v. Texas*, supra; *Meyer v. Wells, Fargo & Co.*, supra, with which compare *Wisconsin & M. R. Co. v. Powers*, supra. Whether the tax was sustained as a fair means of measuring a local privilege or franchise, as in *Maine v. Grand Trunk Railway*, supra; *Ficklen v. Shelby County Taxing District*, supra; *American Manufacturing Company v. St. Louis*, 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084, or as a method of arriving at the fair measure of a tax substituted for local property taxes, *Cudahy Packing Co. v. Minnesota*, supra; *United States Express Company v. Minnesota*, supra; cf. *Postal Telegraph Cable Co. v. Adams*, supra; see *McHenry v. Alford*, 168 U.S. 651, 670, 671, 18 S.Ct. 242, 42 L.Ed. 614, it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on. A tax on gross receipts from tolls for the use by interstate trains of tracks lying wholly within the taxing state is valid, *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U.S. 431, 15 S.Ct. 896, 39 L.Ed. 1043; cf. *Henderson Bridge Co. v. Kentucky*, 166 U.S. 150, 17 S.Ct. 532, 41 L.Ed. 953, although a like tax on gross receipts from the rental of railroad cars used in interstate commerce both within and without the taxing state is invalid. *Fargo v. Michigan*, supra. In the one case the tax reaches only that part of the commerce carried on within the taxing state; in the other it extends to the commerce carried on without the state boundaries, and, if valid, could be similarly laid in every other state in which the business is conducted.

In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax. This Court has sustained a similar tax said to be on the privilege of manufacturing, measured by the total gross receipts from sales of the manu-

factured goods both intrastate and interstate. *American Manufacturing Co. v. St. Louis*, supra, 250 U.S. 459, 462, 39 S.Ct. 522, 63 L.Ed. 1084. The actual sales prices which measured the tax were taken to be no more than the measure of the value of the goods, manufactured, and so an appropriate measure of the value of the privilege, the taxation of which was deferred until the goods were sold. *Ficklen v. Shelby County Taxing District*, supra, sustained a license tax measured by a percentage of the gross annual commissions received by brokers engaged in negotiating sales within for sellers without the state.

Viewed only as authority, *American Manufacturing Co. v. St. Louis*, supra, would seem decisive of the present case. But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business.

As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. Cf. *Puget Sound Stevedoring Co. v. Tax Comm'n*, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68. No one would doubt that the tax on the privilege would be valid if it were measured by the amount of advertising space sold. *Utah Power & Light Co. v. Pfof*, supra; *Federal Compress & W. Co. v. McLean*, 291 U.S. 17, 54 S.Ct. 267, 78 L.Ed. 622, or by its value. *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929; *Hope Natural Gas Co. v. Hall*, 274 U.S. 284, 47 S.Ct. 639, 71 L. Ed. 1049. Selling price, taken as a measure of value whose accuracy appellants do not challenge, is for all practical purposes a convenient means of arriving at an equitable measure of the burden which may be imposed on an admittedly taxable subject matter. Unlike the measure of the tax sustained in *American Manufacturing Co. v. St. Louis*, supra, it does not embrace the purchase price (here the magazine subscription price) of the articles shipped in interstate commerce. So far as the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate, we think the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure

of a tax. Experience has taught that the opposing demands that the commerce shall bear its share of local taxation, and that it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce, are not capable of reconciliation by resort to the syllogism. Practical rather than logical distinctions must be sought. See *Galveston, H. & S. A. R. Co. v. Texas*, supra, 210 U.S. 217, 227, 28 S.Ct. 638, 52 L.Ed. 1031. Recognizing that not every local law that affects commerce is a regulation of it in a constitutional sense, this Court has held that local taxes may be laid on property used in the commerce; that its value for taxation may include the augmentation attributable to the commerce in which it is employed; and, finally, that the equivalent of that value may be computed by a measure related to gross receipts when a tax of the latter is substituted for a tax of the former. See *Galveston, H. & S. A. R. Co. v. Texas*, supra, 210 U.S. 217, 225, 28 S.Ct. 638, 52 L.Ed. 1031.

Here it is perhaps enough that the privilege taxed is of a type which has been regarded as so separate and distinct from interstate transportation as to admit of different treatment for purposes of taxation, *Utah Light & Power Co. v. Pfost*, supra; *Federal Compress & Warehouse Co. v. McLean*, supra; *Chasaniol v. Greenwood*, 291 U.S. 584, 54 S.Ct. 541, 78 L.Ed. 1004, and that the value of the privilege is fairly measured by the receipts. The tax is not invalid because the value is enhanced by appellants' circulation of their journal interstate any more than property taxes on railroads are invalid because property value is increased by the circumstance that the railroads do an interstate business.

But there is an added reason why we think the tax is not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate communication or transportation of goods. So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine. As already noted, receipts from subscriptions are not included in the measure of the tax. It is not measured by the extent of the circulation of the magazine interstate. All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are beyond any control and taxing pow-

er which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers. The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent.

In this and other ways the case differs from *Fisher's Blend Station, Inc., v. State Tax Comm'n*, supra, on which appellants rely. There the exaction was a privilege tax laid upon the occupation of broadcasting, which the Court held was itself interstate communication, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from that commerce. If broadcasting could be taxed, so also could reception. *Station WBT, Inc., v. Poulnot*, D.C., 46 F.2d 671. In that event a cumulative tax burden would be imposed on interstate communication such as might ensue if gross receipts from interstate transportation could be taxed. This was the vice of the tax of a percentage of the gross receipts from goods sold by a wholesaler in interstate commerce, held invalid in *Crew Levick Co. v. Pennsylvania*, supra. In form and in substance the tax was thought not to be one for the privilege of doing a local business separable from interstate commerce. Cf. *American Manufacturing Co. v. St. Louis*, supra. In none of these respects is the present tax objectionable.

Affirmed.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER are of opinion that the judgment should be reversed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

#### NOTE

1. State taxes on the gross earnings of interstate and foreign commerce, or their use as a measure of a tax on another tax subject, were generally held invalid, *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U.S. 217, 28 S.Ct. 638, 52 L.Ed. 1031 (1908); *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 38 S.Ct. 126, 62 L.Ed. 295 (1917); cf. *Maine v. Grand Trunk R. Co.*, 142 U.S. 217, 12 S.Ct. 121, 35 L.Ed. 994 (1891). See also Note on p. 380, paragraph 3. Relatively recent cases in accord with the general rule are *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956 (1936) (license tax measured by gross receipts from radio broadcasting); *Puget Sound Stevedoring Co. v. Tax Commission of Washington*, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68 (1937) (license tax measured by gross receipts from loading and unloading vessels engaged in interstate and foreign commerce). The last case was followed in *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 67 S.Ct. 815, 91 L.Ed. 993 (1947), despite claims that it had been impliedly overruled by the sales tax cases.

A minority of the Court accepted that position as applied to interstate commerce, and based the invalidity of the tax as applied to foreign commerce on Const.U.S. art. 1, § 10, which prohibits the states, without the consent of Congress, from laying imposts or duties on imports or exports. The most recent decision held invalid an unapportioned tax on the gross earnings from interstate transportation between points in the taxing state over a route passing through other states, *Central Greyhound Lines, Inc., v. State Tax Commission of New York*, — U.S. —, 68 S.Ct. 1260, 92 L.Ed. — (1948). It was conceded that a tax thereon apportioned to the state on a mileage basis would be valid. See T. R. Powell, *New Light on Gross Receipts Taxes*, 53 Harv.L.Rev. 909 (1940); W. B. Lockhart, *State Tax Barriers to Interstate Trade*, 53 Harv.L.Rev. 1253 (1940); W. B. Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv.L.Rev. 40 (1943); T. R. Powell, *More Ado About Gross Receipts Taxes*, 60 Harv.L.Rev. 501, 710 (1947).

2. The limits of the doctrine of the reported case are discussed in *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 59 S.Ct. 325, 83 L.Ed. 272 (1939).

3. The commerce clause does not prohibit state taxation of the net income from interstate or foreign commerce; *U. S. Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 38 S.Ct. 499, 62 L.Ed. 1135 (1918); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165 (1920); *Atlantic Coast Line R. Co. v. Doughton*, 262 U.S. 413, 43 S.Ct. 620, 67 L.Ed. 1051 (1923). See T. R. Powell, *State Income Taxes and the Commerce Clause*, 31 Yale L.Jour. 799 (1922).

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### MCGOLDRICK v. BERWIND-WHITE COAL MINING CO.

Supreme Court of the United States, 1940.  
309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565.

Mr. Justice STONE delivered the opinion of the Court.

The question for decision is whether the New York City tax laid upon sales of goods for consumption, as applied to respondent, infringes the commerce clause of the Federal Constitution. U.S.C.A.Const. art. 1, § 8, cl. 3.

Upon certiorari to review a determination by the Comptroller of the City of New York that respondent was subject to New York City sales tax in the sum of \$176,703, the Appellate Division of the New York Supreme Court held that the taxing statute as applied to respondent does so infringe, 255 App.Div. 961, 8 N.Y.S.2d 668, on the authority of *Matter of National Cash Register Co. v. Taylor*, 276 N.Y. 208, 11 N.E.2d 881, certiorari denied *McGoldrick v. National Cash Register Co.*, 303 U.S. 656, 58 S.Ct. 759, 82 L.Ed. 1115; *Matter of Compagnie Generale Transatlantique v. McGoldrick*, 279 N.Y. 192, 18 N.E.2d 28. The New York

Court of Appeals affirmed without opinion, 281 N.Y. 670, 22 N.E.2d 764, but its amended remittitur declared that the affirmation was upon the sole ground that the taxing statute as applied violated the commerce clause. We granted certiorari December 4, 1939, 308 U.S. 546, 60 S.Ct. 261, 84 L.Ed. 565, the question presented being of public importance, upon a petition which challenged the decision of the state court as not in accord with applicable decisions of this Court in *Banker Brothers v. Pennsylvania*, 222 U.S. 210, 32 S.Ct. 38, 56 L.Ed. 168; *Wilcoil Corporation v. Pennsylvania*, 294 U.S. 169, 55 S.Ct. 358, 79 L.Ed. 838.

Chapter 815 of the New York Laws of 1933, Ex.Sess., as amended by Chapter 873 of the New York Laws of 1934, Ex.Sess., authorized the City of New York, for a limited period within which the present tax was laid, "to adopt and amend local laws imposing in [the] city any tax which the legislature has or would have power and authority to impose". It directed that "a tax imposed hereunder shall have application only within the territorial limits" of the city; and that "this act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of [the] city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits". It required the revenues from the tax to be used exclusively for unemployment relief.

Pursuant to this authority the municipal assembly of the City of New York adopted Local Law No. 24 of 1934, p. 164 (published as Local Law No. 25), since annually renewed, which laid a tax upon purchasers for consumption of tangible personal property generally (except foods and drugs furnished on prescription), of utility services in supplying gas, electricity, telephone service, etc., and of meals consumed in restaurants. By § 2 the tax was fixed at "two per centum upon the amount of the receipts from every sale in the city of New York", "sale" being defined by § 1(e) as "any transfer of title or possession, or both \* \* \* in any manner or by any means whatsoever for a consideration, or any agreement therefor". Another clause of § 2 commands that the tax "shall be paid by the purchaser to the vendor, for and on account of the city of New York". By the same clause the vendor, who is authorized to collect the tax, is required to charge it to the purchaser, separately from the sales price; and is made liable, as an insurer, for its payment to the city. By §§ 4 and 5 the vendor is required to keep records and file returns showing the amount of the receipts from sales and the amount of the tax. In event of its nonpayment to the seller the buyer is required, within fifteen days after his purchase, to file a tax return and to pay the

tax to the Comptroller who is authorized by § 2 to set up a procedure for the collection of the tax from the purchaser. Purchases for resale are exempt from the tax, and a purchaser who pays the tax and later resells is entitled to a refund.

The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. Only in event that the seller fails to pay over to the city the tax collected or to charge and collect it as the statute requires, is the burden cast on him. It is conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, "consummated" there, for the transfer of title, or possession. The duty of collecting the tax and paying it over to the Comptroller is imposed on the seller in addition to the duty imposed upon the buyer to pay the tax to the Comptroller when not so collected. Such, in substance, has been the construction of the statute by the state courts. \* \* \*

Respondent, a Pennsylvania corporation, is engaged in the production of coal of specified grades, said to possess unique qualities, from its mines within that state and in selling it to consumers and dealers. It maintains a sales office in New York City and sells annually to its customers, 1,500,000 tons of its product, of which approximately 1,300,000 tons are delivered by respondent to some twenty public utility and steamship companies. The coal moves by rail from mine to dock in Jersey City, thence in most instances by barge to the point of delivery. All the sales contracts with the New York customers in question were entered into in New York City, and with two exceptions, presently to be considered separately, call for delivery of the coal by respondent by barge, alongside the purchasers' plants or steamships. In many instances the price of the coal was stated to be subject to any increase or decrease of mining costs including wages, and of railroad rates between the mines and the Jersey City terminal to which the coal was to be shipped. All the deliveries, with the exceptions already noted, were made within New York City, and all such are concededly subject to the tax except insofar as it infringes the commerce clause.

Section 8, clause 3, article 1, of the Constitution declares that "Congress shall have Power \* \* \* To regulate Commerce with foreign Nations, and among the several States \* \* \*". In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the

authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. See *Gibbons v. Ogden*, 9 Wheat. 1, 187, 6 L.Ed. 23; *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185, 58 S.Ct. 510, 513, 82 L.Ed. 734. Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states.

But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823, 115 A.L.R. 944. Not all state taxation is to be condemned because in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless falls short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or withdrawal for use, by the consignee after the interstate journey has ended is not precluded. Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate commerce, forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is prerequisite to it. *Western Live Stock v. Bureau of Revenue*, supra, 303 U.S. page 253, 58 S.Ct. page 547, 82 L.Ed. 823, 115 A.L.R. 944, and cases cited.

In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious operation of powers reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power

to lay taxes for the support of state government shall not be unduly curtailed. \* \* \*

Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce.

The present tax as applied to respondent is without the possibility of such consequences. Equality is its theme, cf. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583, 57 S.Ct. 524, 527, 81 L.Ed. 814. It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the "use" of property which has just been moved in interstate commerce sustained in *Monomotor Oil Co. v. Johnson*, 292 U.S. 86, 54 S.Ct. 575, 78 L.Ed. 1141; *Henneford v. Silas Mason Co.*, *supra*; *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488; *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586, or the tax on storage or withdrawal for use by the consignee of gasoline, similarly sustained in *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 52 S.Ct. 631, 76 L.Ed. 1232, 84 A.L.R. 831; *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730, 87 A.L.R. 1191; *Edelman v. Boeing Air Transport Co.*, 289 U.S. 249, 53 S.Ct. 591, 77 L.Ed. 1155, or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey. *Brown v. Houston*, *supra*; *American Steel & Wire Co. v. Speed*, 192 U.S. 500, 24 S.Ct. 365, 48 L.Ed. 538.

If, as guides to decision we look to the purpose of the commerce clause to protect interstate commerce from discriminatory or destructive state action, and at the same time to the purpose of the state taxing power under which interstate commerce admittedly must bear its fair share of state tax burdens, and to the necessity of judicial reconciliation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation which, in the absence of Congressional action the commerce clause forbids. This Court has uniformly sustained a tax imposed by the state of the buyer upon a sale of goods, in several instances in the "original package", effected by delivery to the purchaser upon arrival at destination after an interstate journey, both when the local seller has purchased the goods extra-state for the purpose of resale, *Woodruff v. Parham*, supra; *Hinson v. Lott*, 8 Wall. 148, 19 L.Ed. 387; *Banker Bros. v. Pennsylvania*, supra; *Wiloil Corp. v. Pennsylvania*, supra; *Graybar Electric Co. v. Curry*, 308 U.S. 513, 60 S.Ct. 139, 84 L.Ed. 437; *Id.*, Ala.Sup., 189 So. 186, and when the extra-state seller has shipped them into the taxing state for sale there. *Hinson v. Lott*, supra; *Sonneborn Bros. v. Cureton*, 262 U.S. 506, 43 S.Ct. 643, 67 L.Ed. 1095. It has likewise sustained a fixed-sum license tax imposed on the agent of the interstate seller for the privilege of selling merchandise brought into the taxing state for the purpose of sale. *Howe Machine Co. v. Gage*, 100 U.S. 676, 25 L.Ed. 754; *Emert v. Missouri*, 156 U.S. 296, 15 S.Ct. 367, 39 L.Ed. 430; *Kehrer v. Stewart*, 197 U.S. 60, 25 S.Ct. 403, 49 L.Ed. 663; *Baccus v. Louisiana*, 232 U.S. 334, 34 S.Ct. 439, 58 L.Ed. 627; *Wagner v. Covington*, 251 U.S. 95, 104, 40 S.Ct. 93, 64 L.Ed. 157, 168.

The only challenge made to these controlling authorities is by reference to unconstitutional "burdens" on interstate commerce made in general statements which are inapplicable here because they are torn from their setting in judicial opinions and speak of state regulations or taxes of a different kind laid in different circumstances from those with which we are now concerned. See for example, *Galveston, H. & S. A. R. Co. v. Texas*, supra; *Cooney v. Mountain States Telephone Co.*, 294 U.S. 384, 55 S.Ct. 477, 79 L.Ed. 934; *Fisher's Blend Station v. Tax Commission*, 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956. Others will presently be discussed. But unless we are now to reject the plain teaching of this line of sales tax decisions, extending back for more than seventy years from *Graybar Electric Co. v. Curry*, supra, decided this term to *Woodruff v. Parham*, supra, the present tax must be upheld. As we have seen, the ruling of these decisions does not rest on precedent alone. It has the support of reason and of a due regard for the just balance between national and state power.

In sustaining these taxes on sales emphasis was placed on the circumstances that they were not so laid, measured or conditioned as to afford a means of obstruction to the commerce or of discrimination against it, and that the extension of the immunity of the commerce clause contended for would be at the expense of state taxing power by withholding from taxation property and transactions within the state without the gain of any needed protection to interstate commerce. \* \* \*

Apart from these more fundamental considerations which we think are of controlling force in the application of the commerce clause, we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey from the tax which may be laid in like fashion on the property itself. That the latter is a permissible tax has long been established by an unwavering line of authority. \* \* \* As we have often pointed out, there is no distinction in this relationship between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements. \* \* \* If coal situated as that in the present case, was before its delivery, subject to a state property tax, see *Brown v. Houston*; *Pittsburgh & So. Coal Co. v. Bates*; transfer of possession of the coal upon a sale is equally taxable \* \* \* just as was the storage or use of the property in similar circumstances held taxable in *Nashville, Chattanooga & St. L. R. Co. v. Wallace*; *Henneford v. Silas Mason Co.*

Respondent, pointing to the course of its business and to its contracts which contemplate the shipment of the coal interstate upon orders of the New York customers, insists that a distinction is to be taken between a tax laid on sales made, without previous contract, after the merchandise has crossed the state boundary, and sales, the contracts for which when made contemplate or require the transportation of merchandise interstate to the taxing state. Only the sales in the state of destination in the latter class of cases, it is said, are protected from taxation by the commerce clause, a qualification which respondent concedes is a salutary limitation upon the reach of the clause since its use is thus precluded as a means of avoiding state taxation of merchandise transported to the state in advance of the purchase order or contract of sale.

But we think this distinction is without the support of reason or authority. A very large part, if not most of the merchandise sold in New York City, is shipped interstate to that market. In the case of products like cotton, citrus fruits and coal, not to

mention many others which are consumed there in vast quantities, all have crossed the state line to seek a market, whether in fulfillment of a contract or not. That is equally the case with other goods sent from without the state to the New York market, whether they are brought into competition with like goods produced within the state or not. We are unable to say that the present tax, laid generally upon all sales to consumers within the state, subjects the commerce involved where the goods sold are brought from other states, to any greater burden or affects it more, in any economic or practical way, whether the purchase order or contract precedes or follows the interstate shipment. Since the tax applies only if a sale is made, and in either case the object of interstate shipment is a sale at destination, the deterrent effect of the tax would seem to be the same on both. Restriction of the scope of the commerce clause so as to prevent recourse to it as a means of curtailing state taxing power seems as salutary in the one case as in the other. \* \* \*

It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following *Robbins v. Shelby County Taxing District*, 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 694, which have held invalid license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. See *Robbins v. Shelby County Taxing District*, supra, 120 U.S. page 498, 7 S.Ct. page 596, 30 L.Ed. 694; *Caldwell v. North Carolina*, 187 U.S. 622, 632, 23 S.Ct. 229, 233, 47 L.Ed. 336. In all, the statute, in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state. While a state, in some circumstances may, by taxation suppress or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed, see *Puget Sound Power & Light Co. v. Seattle*, 291 U.S. 619, 625, 54 S.Ct. 542, 545, 78 L.Ed. 1025, and cases cited, it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute. Compare *Hammond Packing Co. v. Montana*, 233 U.S. 331, 34 S.Ct. 596, 58 L.Ed. 985, *Magnano Co. v. Hamilton*, 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109, with *Schollenberger v. Pennsylvania*, 171 U.S. 1, 18 S.Ct. 757, 43 L.Ed. 49; *Robbins v. Shelby County Taxing District*, supra; *Sprout v. South Bend*, 277 U.S. 163, 48 S.Ct. 502, 72 L.Ed.

833, 62 A.L.R. 45. It is enough for present purposes that the rule of *Robbins v. Shelby County Taxing District*, *supra*, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate. Compare *Robbins v. Shelby County Taxing District*, *supra*, with *Ficklen v. Shelby County Taxing District*, 145 U.S. 1, 12 S.Ct. 810, 36 L.Ed. 601, see *Howe Machine Co. v. Gage*, *supra*; *Wagner v. Covington*, *supra*; and that the actual and potential effect on the commerce of such a tax is wholly wanting in the present case.

Finally it is said that the vice of the present tax is that it is measured by the gross receipts from interstate commerce and thus in effect reaches for taxation the commerce carried on both within and without the taxing state. *Adams Manufacturing Co. v. Storen*, 304 U.S. 307, 58 S.Ct. 913, 82 L.Ed. 1365, 117 A.L.R. 429; *Gwin, White & Prince v. Henneford*, *supra*; cf. *Western Live Stock v. Bureau*, *supra*, 303 U.S. page 260, 58 S.Ct. page 550, 82 L.Ed. 823, 115 A.L.R. 944. It is true that a state tax upon the operations of interstate commerce measured either by its volume or the gross receipts derived from it has been held to infringe the commerce clause, because the tax if sustained would exact tribute for the commerce carried on beyond the boundaries of the taxing state, and would leave each state through which the commerce passes free to subject it to a like burden not borne by intrastate commerce. See *Western Live Stock v. Bureau of Revenue*, *supra*, 303 U.S. page 255, 58 S.Ct. page 548, 82 L.Ed. 823, 115 A.L.R. 944; *Gwin, White & Prince v. Henneford*, *supra*, 305 U.S. page 439, 59 S.Ct. page 327, 83 L.Ed. 272.

In *Adams Manufacturing Co. v. Storen*, *supra*, 304 U.S. pages 311, 312, 58 S.Ct. pages 915, 916, 82 L.Ed. 1365, 117 A.L.R. 429, a tax on gross receipts, so far as laid by the state of the seller upon the receipts from sales of goods manufactured in the taxing state and sold in other states, was held invalid because there the court found the receipts derived from activities in interstate commerce, as distinguished from the receipts from activities wholly intrastate, were included in the measure of the tax, the sales price, without segregation or apportionment. It was pointed out, pages 310, 311 and 312, of 304 U.S., at pages 915, 916, of 58 S.Ct., 82 L.Ed. 1365, 117 A.L.R. 429, that had the tax been conditioned upon the exercise of the taxpayer's franchise or its privilege of manufacturing in the taxing state, it would have been sustained, despite its incidental effect on interstate commerce since the taxpayer's local activities or privileges were sufficient to support such a tax, and that it could fairly be measured by the sales price of the goods. Compare *American Manufacturing Co. v. St. Louis*,

250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084 with *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 38 S.Ct. 126, 62 L.Ed. 295. \* \* \*

The rationale of the *Adams Manufacturing Co.* case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity delivery of goods within the state upon their purchase for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce. \* \* \*

Upon the remand of this cause for further proceedings not inconsistent with this decision, the state court will be free to decide the state question, and the remand will be without prejudice to the further presentation to this Court of any federal question remaining undecided here, if the state court shall determine that the taxing statute is applicable.

Reversed and remanded.

Mr. Chief Justice HUGHES dissented in an opinion concurred in by Justices ROBERTS and McREYNOLDS.

#### NOTE

1. Prior to the decision in the reported case state sales taxes on specific sales, and state license taxes on the business of selling in interstate commerce, had generally been held invalid, whether imposed by the state of origin or destination of the goods sold; *Robbins v. Shelby County Taxing District*, 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 694 (1887); *Wagner v. Covington*, 251 U.S. 95, 40 S.Ct. 93, 64 L.Ed. 157 (1919); *Heyman v. Hays*, 236 U.S. 178, 35 S.Ct. 403, 59 L.Ed. 527 (1915); cf. *Banker Bros. v. Pennsylvania*, 222 U.S. 210, 32 S.Ct. 38, 56 L.Ed. 168 (1911), *Superior Oil Co. v. Mississippi*, 280 U.S. 390, 50 S.Ct. 169, 74 L.Ed. 504 (1930), and *Wil-oil Corp. v. Pennsylvania*, 294 U.S. 169, 55 S.Ct. 358, 79 L.Ed. 836 (1935). See W. B. Lockhart, *The Sales Tax in Interstate Commerce*, 52 *Harv.L.Rev.* 617 (1939); S. Morrison, *State Taxation of Interstate Commerce*, 36 *Ill.L.Rev.* 727 (1942); Note, M. R. Schlesinger, *Sales Taxes, Interstate Trade Barriers, and Congress*, 39 *Mich.L. Rev.* 755 (1941); Note, *Sales and Use Taxes*, 57 *Harv.L.Rev.* 1086 (1944).

2. States levying sales taxes developed "use taxes" to obviate the competitive disadvantages to their local vendors due to their inability to tax interstate sales. These were held not prohibited by the commerce clause; see *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937); *Southern Pac. Co. v. Gallagher*, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586 (1939); cf. *Helson v. Kentucky*, 279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683 (1929).

The Supreme Court has shown great liberality in sustaining methods adopted by states for collecting such taxes, *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488 (1939); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888 (1941); *General Trading Co. v. State Tax Commission of Iowa*, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309 (1944).

3. See *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944), for a discussion of a state of facts under which state of destination was not permitted to impose a sales tax; cf. with the facts in *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U.S. 70, 60 S.Ct. 404, 84 L.Ed. 584 (1940), relating to the Massachusetts corporation involved therein.

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### FREEMAN v. HEWITT.

Supreme Court of the United States, 1946.  
329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265.

Mr. Justice FRANKFURTER delivered the opinion of the Court.

This case presents another phase of the Indiana Gross Income Tax Act of 1933, which has been before this Court in a series of cases beginning with *Adams Mfg. Co. v. Storen*, 304 U.S. 307, 58 S.Ct. 913, 82 L.Ed. 1365, 117 A.L.R. 429. The Act imposes a tax upon "the receipt of the entire gross income" of residents and domiciliaries of Indiana but excepts from its scope "Such gross income as is derived from business conducted in commerce between this state and other states of the United States \* \* \* to the extent to which the state of Indiana is prohibited from taxing such gross income by the Constitution of the United States." Indiana Laws 1933, pp. 388, 392, as amended, Laws 1937, p. 615, Burns' Ind.Stat.Anno. § 64-2601. et seq.

Appellant's predecessor domiciled in Indiana, was trustee of an estate created by the will of a decedent domiciled in Indiana at the time of his death. During 1940, the trustee instructed his Indiana broker to arrange for the sale at stated prices of securities forming part of the trust estate. Through the broker's New York correspondents the securities were offered for sale on the New York Stock Exchange. When a purchaser was found, the New York brokers notified the Indiana broker who in turn informed the trustee, and the latter brought the securities to his broker for mailing to New York. Upon their delivery to the purchasers, the New York brokers received the purchase price, which, after deducting expenses and commission, they transmitted to the Indiana broker. The latter delivered the proceeds less his commission to the trustee. On the gross receipts of

these sales, amounting to \$65,214.20, Indiana, under the Act of 1933, imposed a tax of 1%. Having paid the tax under protest, the trustee brought this suit for its recovery. The Supreme Court of Indiana, reversing a court of first instance, sustained the tax on the ground that the situs of the securities was in Indiana. 221 Ind. 675, 51 N.E.2d 6. The case is here on appeal under § 237(a) of the Judicial Code, 28 U.S.C. 344(a), 28 U.S.C.A. § 344(a), and has had the consideration which two arguments afford.

The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a federal government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the central government and of the constituent States.

The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts.

Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915; *Morgan v. Virginia*, 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317, 165 A.L.R. 574. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power, as the *Morgan* case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.

These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense. But, in the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State.

\* \* \* State taxation falling on interstate commerce, on the other hand, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. But revenue serves as well no matter what its source. To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function. Moreover, the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations. The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce. The task of scrutinizing is a task of drawing lines. This is the historic duty of the Court so long as Congress does not undertake to make specific arrangements between the national government and the States in regard to revenues from interstate commerce. See Act of July 3, 1944, 58 Stat. 723, 49 U.S.C.A. § 425 note; H.Doc. 141, 79th Cong., 1st Sess., "Multiple Taxation of Air Commerce"; and compare 54 Stat. 1059, 4 U.S.C. § 13 et seq., 4 U.S.C.A. § 13 et seq. (permission to States to extend taxing power to Federal areas). Considerations of proximity and degree are here, as so often in the law, decisive.

It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade.

So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce. The Commerce Clause does not involve an exercise in the logic of empty categories. It operates within the framework of our federal scheme and with due regard to the national experience reflected by the decisions of this Court, even though the terms in which these decisions have been cast may have varied. Language alters, and there is a fashion in judicial writing as in other things.

This case, like *Adams Mfg. Co. v. Storen*, *supra*, involves a tax imposed by the State of the seller on the proceeds of interstate sales. To extract a fair tithe from interstate commerce for the local protection afforded to it, a seller State need not impose the kind of tax which Indiana here levied. As a practical matter, it can make such commerce pay its way, as the phrase runs, apart from taxing the very sale. Thus, it can tax local manufacture even if the products are destined for other States. For some purposes, manufacture and the shipment of its products beyond a State may be looked upon as an integral transaction. But when accommodation must be made between state and national interests, manufacture within a State, though destined for shipment outside, is not a seamless web so as to prevent a State from giving the manufacturing part detached relevance for purposes of local taxation. *American Mfg. Co. v. City of St. Louis*, 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084; *Utah Power & L. Co. v. Pfof*, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038. It can impose license taxes on domestic and foreign corporations who would do business in the State, *Cheney Brothers Co. v. Commonwealth of Massachusetts*, 246 U.S. 147, 38 S.Ct. 295, 62 L.Ed. 632; *St. Louis Southwestern Ry. v. State of Arkansas*, 235 U.S. 350, 364, 35 S.Ct. 99, 103, 59 L.Ed. 265, though it cannot, even under the guise of such excises, "hamper" interstate commerce. *Western Union Tel. Co. v. State of Kansas*, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355; *Pullman Co. v. State of Kansas*, 216 U.S. 56, 30 S.Ct. 232, 54 L.Ed. 378 (particularly *White, J.*

concurring at p. 63); Henderson, *The Position of Foreign Corporations in American Constitutional Law* (1918) 118-23, 128-31. It can tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce. *United States Glue Co. v. Oak Creek*, 247 U.S. 321, 38 S.Ct. 499, 62 L.Ed. 1135, Ann.Cas.1918E, 748; cf. *Atlantic Coast Line v. Doughton*, 262 U.S. 413, 43 S.Ct. 620, 67 L.Ed. 1051. And where, as in this case, the commodities subsequently sold interstate are securities, they can be reached by a property tax by the State of domicile of the owner. *Commonwealth of Virginia v. Imperial Sales Co.*, 293 U.S. 15, 19, 55 S.Ct. 12, 13, 79 L.Ed. 171; and see *Citizens National Bank of Cincinnati v. Durr*, 257 U.S. 99, 42 S.Ct. 15, 66 L.Ed. 149.

These illustrative instances show that a seller State has various means of obtaining legitimate contribution to the costs of its government, without imposing a direct tax on interstate sales. While these permitted taxes may in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause.

It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce. Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with

the freedom of interstate commerce. Such a tax by the seller State alone must be judged burdensome in the context of the circumstances in which the tax takes effect. Trade being a sensitive plant, a direct tax upon it to some extent at least deters trade even if its effect is not precisely calculable. Many States, for instance, impose taxes on the consumption of goods and such taxes have been sustained regardless of the extra-State origin of the goods, or whether a tax on their sale had been imposed by the seller State. Such potential taxation by consumer States is but one factor pointing to the deterrent effect on commerce by a super-imposed gross receipts tax.

It has been urged that the force of the decision in the Adams case has been sapped by *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 S.Ct. 388, 398, 84 L.Ed. 565, 128 A.L.R. 876. The decision in *McGoldrick v. Berwind-White* was found not to impinge upon "the rationale of the Adams Manufacturing Co. case," and the tax was sustained because it was "conditioned upon a local activity delivery of goods within the state upon their purchase for consumption." 309 U.S. at page 58, 60 S.Ct. at page 398, 84 L.Ed. 565, 128 A.L.R. 876. Compare *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304. Taxes which have the same effect as consumption taxes are properly differentiated from a direct imposition on interstate commerce, such as was before the Court in the Adams case and is now before us. The tax on the sale itself cannot be differentiated from a direct unapportioned tax on gross receipts which has been definitely held beyond the State taxing power ever since *Fargo v. State of Michigan*, 121 U.S. 230, 7 S.Ct. 857, 30 L.Ed. 888, and *Philadelphia & S. M. Steamship Co. v. Commonwealth of Pennsylvania*, 122 U.S. 326, 7 S.Ct. 1118, 30 L.Ed. 1200. \* \* \* For not even an "internal regulation" by a State will be allowed if it directly affects interstate commerce. *Robbins v. Taxing District of Shelby Co.*, 120 U.S. 489, 494, 7 S.Ct. 592, 594, 30 L.Ed. 694.

Nor is *American Mfg. Co. v. City of St. Louis*, 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084, or *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 64 S.Ct. 1019, 1030, 88 L.Ed. 1313, any justification for the present tax. The *American Mfg. Co.* case involved an imposition by St. Louis of a license fee upon the conduct of manufacturing within that city. It has long been settled that a State can levy such an occupation tax graduated according to the volume of manufacture. In that case, to lighten the manufacturer's burden, the imposition of the occupation tax was made contingent upon the actual sale

of the goods locally manufactured. Sales in St. Louis of goods made elsewhere were not taken into account in measuring the license fee. That tax, then, unlike this, was not in fact a tax on gross receipts. Cf. *Cornell v. Coyne*, 192 U.S. 418, 24 S.Ct. 383, 48 L.Ed. 504. And, if words are to correspond to things, the tax now here is not "a tax on the transfer of property" within the State, which was the basis for sustaining the tax in *International Harvester Co. v. Dept. of Treasury*, supra, 322 U.S. at page 348, 64 S.Ct. at page 1023, 88 L.Ed. 1313.

There remains only the claim that an interstate sale of intangibles differs from an interstate sale of tangibles in respects material to the issue in this case. It was by this distinction that the Supreme Court of Indiana sought to escape the authority of *Adams Mfg. Co. v. Storen*, supra. Latin tags like *mobilia sequuntur personam* often do service for legal analysis, but they ought not to confound constitutional issues. What Mr. Justice Holmes said about that phrase is relevant here. "It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying *mobilia sequuntur personam*. But being a fiction it is not allowed to obscure the facts, when the facts become important." *Blackstone v. Miller*, 188 U.S. 189, 204, 23 S.Ct. 277, 278, 47 L.Ed. 439. Of course this is an interstate sale. And constitutionally it is commerce no less and no different because the subject was pieces of paper worth \$65,214.20, rather than machines.

Reversed.

Mr. Justice RUTLEDGE concurred in a separate opinion. Messrs. Justices BLACK, DOUGLAS and MURPHY dissented.

ATLANTIC LUMBER CO. v. COMM'R of CORP. AND  
TAXATION.

Supreme Court of the United States, 1936. 298 U.S. 553, 56 S.Ct. 887,  
80 L.Ed. 1328.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

A Massachusetts statute (Gen.Laws [Ter.Ed.] c. 63, §§ 39-43) imposes upon a foreign corporation, with respect to the carrying on or doing of business by it within the commonwealth, an excise in a sum to be ascertained as the statute provides. So far as the present case is concerned, the amount of the excise is a specified percentage of the value of the corporate excess employed by the corporation within the commonwealth. Such corporate excess (section 30, par. 4) means, in the case of a foreign corporation, such proportion of the fair value of its capital stock as the value of the assets employed in the commonwealth bears to the value of its total assets, less certain deductions. Under this statute appellant's tax was fixed at approximately \$1,500. We find nothing in the record to justify the conclusion that the amount of the tax was not fairly arrived at under the provisions of the statute as construed by the court below, or that it was so allocated as to result in imposing a tax upon property outside the state; and the only question is whether the tax constitutes an unconstitutional burden upon interstate commerce. The court below, sustaining the action of the state board of tax appeals, held that the exaction was an excise for the privilege of having a place for the transaction of intrastate business in the state with the protection of state law and the appertaining advantages; and that the effect upon interstate commerce was at most incidental and remote. 291 Mass. 51, 197 N.E. 525.

Appellant is a corporation engaged in the wholesale lumber business, and is organized under the laws of Delaware. Its principal office is in Massachusetts, where it also maintains a sales office. Its Massachusetts office is used as headquarters for salesmen, who solicit orders in Massachusetts and other states. In that office it carries on correspondence and other business activities in connection with orders for and shipments of goods for the designated territory. Orders are accepted at the Massachusetts office, and are filled from the distributing yard of the company or the mill of a subsidiary outside the state. Remittances from its customers are made to the Massachusetts office. No stocks of lumber are kept in that state; and the only tangible property in the state is office furniture and equipment and salesmen's automobiles. Appellant has bank accounts in Boston, New York City, Buffalo, Brooklyn, and Toronto, Canada; the

Boston account being the most active. The corporate books and records are kept in Massachusetts, where its treasurer is located, its directors' meetings are held, and dividends are declared. Dividends, so far as declared, have been paid out of the Boston account.

Appellant owns practically all the stock of three subsidiaries. Two of them are engaged in cutting timber and manufacturing lumber—one in Tennessee, Arkansas, and Louisiana, and the other in South Carolina. The third subsidiary simply holds title to timber lands in Louisiana.

If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution. *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 45 S.Ct. 477, 69 L.Ed. 916, 44 A.L.R. 1219; *Cheney Brothers Co. v. Massachusetts*, 246 U.S. 147, 153, 38 S.Ct. 295, 62 L.Ed. 632; *Ozark Pipe Line Co. v. Monier*, 266 U.S. 555, 562 et seq., 45 S.Ct. 184, 185, 69 L.Ed. 439.

But such is not the case. Although organized in Delaware, so far as the record shows appellant does not function there but in Massachusetts, to which state the exercise of its corporate powers was transferred and is confined. In the *Champion Copper Company Case*, decided by this court in *Cheney Brothers Co. v. Massachusetts*, supra, 246 U.S. 147, at page 155, 38 S.Ct. 295, 297, 62 L.Ed. 632, a Michigan corporation maintained an office in Boston, pursuant to a provision in its articles of association. The proceeds of its business in Michigan were deposited in Boston banks, which, after paying salaries and expenses, were distributed as dividends from the Boston office. Directors' meetings were held frequently during each year at the Boston office, at which meetings reports from the treasurer and general manager were received, dividends were voted, officers were elected, and other corporate duties were discharged. This court held: "These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that state."

The same decision involved a similar tax imposed upon another Michigan corporation, the *Copper Range Company*. That company also maintained an office in Boston. It was, like the appellant here, a holding company. In Massachusetts it held stockholders' and directors' meetings, kept corporate records and books of account, received dividends from its stock holdings, deposited the money in Boston banks, and paid the same out, after deducting salaries and expenses, in dividends to its stockholders. We held: "The exaction of a tax for the exercise of such corporate faculties is within the power of the state. Interstate commerce is not affected."

The decision in respect of those companies covers the present case; and since that decision has never been overruled or qualified, it would be unnecessary to go further, except for *Ozark Pipe Line v. Monier*, *supra*, upon which appellant confidently leans. The situation there, however, was quite different from that presented in the present case or in the cases of the two Michigan corporations just mentioned—a difference plainly recognized by the opinion in the *Ozark Case*. There, a Maryland corporation owned and operated a pipe line extending from Oklahoma through Missouri to Illinois, by which crude petroleum was carried from Oklahoma to Illinois. No oil was received or delivered in Missouri. The license issued by the state was to engage “exclusively in the business of transporting crude petroleum by pipe line.” The company, it is true, maintained its principal office in Missouri and there kept its books and bank accounts, paid its employees, purchased supplies, employed labor, maintained telephone and telegraph lines, and carried on various other activities; but all were linked exclusively to the pipe line and operated only to further the flow of oil in interstate commerce. Neither property nor activities were anything more than aids to the operation of the pipe line; and together with that line they combined to constitute in practical effect an instrumentality of that commerce. Thus, the burden of the tax which the state imposed fell upon interstate transportation immediately and directly, while here the effect upon interstate commerce, so far as there is any, is remote and incidental—a distinction which, in respect of such legislation as we are now considering, marks the line between a tax which is valid and one which is not.

Judgment affirmed.

#### NOTE

1. Compare with *Ozark Pipe Line Corp. v. Monier*, cited in the reported case, the recent case of *Memphis Natural Gas. Co. v. Stone*, — U.S. —, 68 S.Ct. 1745, 92 L.Ed. — (1948). A state may impose upon foreign corporations a franchise tax for the grant to them, or the exercise by them, of the privilege of engaging therein in intrastate commerce; *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218, 53 S.Ct. 373, 77 L.Ed. 710 (1933); *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 62 S.Ct. 857, 86 L.Ed. 1090 (1942). In case such corporation is engaged within the state in both intrastate and interstate or foreign commerce, the commerce clause has frequently invalidated the tax if it was measured by interstate commerce or extrastate factors; *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355 (1910); *Cudahy Packing Co. v. Hinkle*, 278 U.S. 460, 49 S.Ct. 204, 73 L.Ed. 454 (1928).

2. The extent, if any, to which the standing of the "drummer cases," such as *Robbins v. Shelby County Taxing District*, 120 U.S. 489, 7 S.Ct. 492, 30 L.Ed. 694 (1887), and *Caldwell v. North Carolina*, 187 U.S. 622, 23 S.Ct. 229, 47 L.Ed. 336 (1903), has been affected by recent decisions was discussed in *Nippert v. Richmond*, 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760 (1946).

3. A state tax on gasoline, not purchased within a state but used therein in interstate transportation, was held invalid because in excess of what would be fair compensation for use of the state's highways; *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 60 S.Ct. 504, 84 L.Ed. 683 (1940). See dissenting opinion therein of Mr. Justice Black for the view that such issues should be left to Congress for decision. Had the carrier purchased the gas within the state, its sales tax could have been levied on the sale despite the intended use of the gas for interstate transportation, *Eastern Air Transport v. South Carolina Tax Commission*, 285 U.S. 147, 52 S.Ct. 340, 76 L.Ed. 673 (1932). See P. G. Kauper, *State Taxation of Interstate Motor Carriers*, 32 Mich.L.Rev. 1, 171, 351 (1933, 1934).

4. Congress may relieve a state's taxing power of a limitation which would exist thereon in the absence of Congressional action; and this appears to include Congressional power to permit even discriminatory taxation of interstate commerce; *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946).

5. It has been intimated that Congress might prohibit or limit state taxation affecting interstate commerce which would be valid but for such prohibition or limitation; see opinion of Mr. Justice Frankfurter in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283 (1944). See Note, *Northwest Airlines v. Minnesota*, 57 Harv.L.Rev. 1097 (1944).

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### BEST & CO., Inc. v. MAXWELL.

Supreme Court of the United States, 1940.  
311 U.S. 454, 61 S.Ct. 334, 85 L.Ed. 275.

Mr. Justice REED delivered the opinion of the Court.

Appellant, a New York retail merchandise establishment, rented a display room in a North Carolina hotel for several days during February, 1938, and took orders for goods corresponding to samples; it filled the orders by shipping direct to the customers from New York City. Before using the room appellant paid under protest the tax required by chapter 127, section 121 (e), of the North Carolina Laws of 1937, which levies an annual privilege tax of \$250 on every person or corporation, not a regular retail merchant in the state, who displays samples in any hotel room rented or occupied temporarily for the purpose of securing retail orders. Appellant not being a regular retail mer-

chant of North Carolina admittedly comes within the statute. Asserting, however, that the tax was unconstitutional, especially in view of the commerce clause, art. 1, § 8, cl. 3, it brought this suit for a refund and succeeded in the trial court. The Supreme Court of North Carolina reversed and then, being evenly divided on rehearing, allowed the reversal to stand. The prevailing opinion characterized the tax as one on the commercial use of temporary quarters, which in its operation did not discriminate against interstate commerce and therefore did not come into conflict with the commerce clause.

The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. This standard we think condemns the tax at bar. Nominally the statute taxes all who are not regular retail merchants in North Carolina, regardless of whether they are residents or nonresidents. We must assume, however, on this record that those North Carolina residents competing with appellant for the sale of similar merchandise will normally be regular retail merchants. The retail stores of the state are the natural outlets for merchandise, not those who sell only by sample. Some of these local shops may, like appellant, rent temporary display rooms in sections of North Carolina where they have no permanent store, but even these escape the tax at bar because the location of their central retail store somewhere within the state will qualify them as "regular retail merchants in the State of North Carolina." The only corresponding fixed-sum license tax to which appellant's real competitors are subject is a tax of \$1 per annum for the privilege of doing business. Nonresidents wishing to display their wares must either establish themselves as regular North Carolina retail merchants at prohibitive expense, or else pay this \$250 tax that bears no relation to actual or probable sales but must be paid in advance no matter how small the sales turn out to be. Interstate commerce can hardly survive in so hostile an atmosphere. A \$250 investment in advance, required of out-of-state retailers but not of their real local competitors, can operate only to discourage and hinder the appearance of interstate commerce in the North Carolina retail market. Extrastate merchants would be compelled to turn over their North Carolina trade to regular local merchants selling by sample. North Carolina regular retail merchants would benefit, but to the same extent the commerce of the Nation would suffer discrimination.

The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language.

Judgment reversed.

#### NOTE

1. See also *I. M. Darnell & Son v. Memphis*, 208 U.S. 113, 28 S. Ct. 247, 52 L.Ed. 413 (1908).

2. A state may not discriminate against interstate or foreign commerce in charging for services rendered, and facilities furnished, by it; *Huse v. Glover*, 119 U.S. 543, 7 S.Ct. 313, 30 L.Ed. 487 (1886); *Guy v. Baltimore*, 100 U.S. 434, 25 L.Ed. 743 (1880).

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### CLYDE MALLORY LINES v. STATE of ALABAMA ex rel. STATE DOCKS COMM.

Supreme Court of the United States, 1935. 296 U.S. 261, 56 S.Ct. 194,  
80 L.Ed. 215.

Mr. Justice STONE delivered the opinion of the Court.

This case is here on appeal under section 237 (a) of the Judicial Code, 28 U.S.C. § 344 (a), 28 U.S.C.A. § 344(a), from a judgment of the Supreme Court of Alabama, 229 Ala. 624, 159 So. 53, which affirmed a money judgment of the circuit court of Mobile county for the recovery of "harbor fees" from appellant.

Appellee, the State Docks Commission, is a state agency authorized to conduct "the operation of all harbors and seaports within the State" and to "adopt rules not inconsistent with the provisions of this Act for the purpose of regulating, controlling and conducting the said operation" and with power "to fix from time to time reasonable rates of charges for all services and for the use of all improvements and facilities provided under the authority of this Act." No. 303, Alabama Gen. Acts of 1923, p. 330; No. 1, Ala.Gen.Acts of 1927, pp. 1, 8, 12, 13.

By resolution of March 5, 1924, appellee adopted rules and regulations for the Port of Mobile, for the control, under the direction of a "chief wharfinger" or harbor master, of the movement, disposition, and anchorage of vessels passing in and out of and using the port. By resolution of February 11, 1928, these rules were readopted and a new rule was added prohibiting the discharge of fuel oil into the harbor by vessels and manufacturing plants. The rules also established a schedule of "harbor fees," for mooring and shifting vessels in the harbor, and for all vessels of specified classes entering the harbor, including a fee of \$7.50

for vessels "500 tons and over." Appellants operate vessels of more than 500 tons in the coastwise trade between New York and Mobile, and the present suit was brought by appellee to recover fees incurred by reason of the call of appellant's vessels at Mobile.

The authority of appellee, under the laws and Constitution of the state, to adopt the harbor rules and schedule of fees is not questioned, and the reasonableness of the \$7.50 fee is conceded. But appellant insists that its imposition is prohibited by article 1, § 10, cl. 3, of the Constitution, U.S.C.A.Const. art. 1, § 10, cl. 3, which provides that "no State shall, without the Consent of Congress, lay any Duty of Tonnage," and that it is a burden on interstate commerce forbidden by the commerce clause (U.S.C.A. Const. art. 1, § 8, cl. 3). \* \* \*

The \$7.50 fee is conceded not to be a charge for the use of the state docks or for mooring and shifting vessels, for which specific charges are levied. It is the only fee attributable to the general service rendered by the commission in securing the benefits and protection of the rules to shipping in the harbor. We accept the conclusion of the state court that it is charged for a policing service rendered by the state in the aid of the safe and efficient use of its port, and we address ourselves to the question whether such a fee is forbidden by the Constitution either because it is a "duty of tonnage" or an unwarranted burden on interstate commerce.

1. It seems clear that the prohibition against the imposition of any duty of tonnage was due to the desire of the framers to supplement article 1, § 10, cl. 2, U.S.C.A.Const. art. 1, § 10, cl. 2, denying to the states power to lay duties on imports or exports, see *Southern Steamship Co. v. Portwardens*, 6 Wall. 31, 35, 18 L.Ed. 749; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U.S. 80, 87, 88, 24 L.Ed. 377, by forbidding a corresponding tax on the privilege of access by vessels to the ports of a state, and to their doubts whether the commerce clause would accomplish that purpose. If the states had been left free to tax the privilege of access by vessels to their harbors the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise. At the time of the adoption of the Constitution "tonnage" was a well-understood commercial term signifying in America the internal cubic capacity of a vessel. See *Inman Steamship Co. v. Tinker*, 94 U.S. 238, 243, 24 L.Ed. 118. And duties of tonnage and duties on imports were known to commerce as levies upon the privilege of access by vessels or goods to the ports or to the territorial limits of a state

and were distinct from fees or charges by authority of a state for services facilitating commerce, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, storage, and the like. See *Cooley v. Board of Wardens*, 12 How. 299, 314, 13 L.Ed. 996; *Inman Steamship Co. v. Tinker*, supra, 94 U.S. 238, 243, 24 L.Ed. 118.

Hence the prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port. *Southern Steamship Co. v. Portwardens*, supra; *State Tonnage Tax Cases*, 12 Wall. 204, 20 L.Ed. 370; *Cannon v. New Orleans*, 20 Wall. 577, 22 L.Ed. 417; *Inman Steamship Co. v. Tinker*, supra. And see *Huse v. Glover*, 119 U.S. 543, 549, 550, 7 S.Ct. 313, 30 L.Ed. 487. But it does not extend to charges made by state authority, even though graduated according to tonnage, for services rendered to and enjoyed by the vessel, such as pilotage, *Cooley v. Board of Wardens*, supra, or wharfage, *Keokuk Northern Line Packet Co. v. Keokuk*, supra; *Northwestern Union Packet Co. v. St. Louis*, 100 U.S. 423, 25 L. Ed. 688; *Cincinnati, P., B. S. & P. Packet Co. v. Catlettsburg*, 105 U.S. 559, 26 L.Ed. 1169; *Parkersburg & O. River Transportation Co. v. Parkersburg*, 107 U.S. 691, 2 S.Ct. 732, 27 L.Ed. 584; *Ouachita & M. River Packet Co. v. Aiken*, 121 U.S. 444, 7 S.Ct. 907, 30 L.Ed. 976, or charges for the use of locks on a navigable river, *Huse v. Glover*, supra, or fees for medical inspection, *Morgan's Louisiana & T. R. & S. S. Co. v. Board of Health*, 118 U.S. 455, 6 S.Ct. 1114, 30 L.Ed. 237.

Appellant places its reliance on those cases in which a tax, levied in the guise of wharfage or a charge for medical inspection, was condemned because imposed on all vessels entering a port, whether receiving the benefit of the service or not. See *Southern Steamship Co. v. Portwardens*, supra; *Cannon v. New Orleans*, supra; *Peete v. Morgan*, 19 Wall. 581, 22 L.Ed. 201. It argues that the present fees must similarly be condemned because imposed on all vessels entering the port, and points out that appellant has neither asked nor received any police service such as that which the state court regarded as the basis for the charge.

But the policing of a harbor so as to insure the safety and facility of movement of vessels using it differs from wharfage or other services which benefit only the particular vessels using them. It is not any the less a service beneficial to appellant because its vessels have not been given any special assistance. The benefits which flow from the enforcement of regulations, such

as the present, to protect and facilitate traffic in a busy harbor inure to all who enter it. Upon this ground, among others, a fee for half pilotage imposed upon vessels such as were not required to take a pilot was upheld in *Cooley v. Board of Wardens*, supra, 12 How. 299, 312, 313, 13 L.Ed. 996. We conclude that a reasonable charge for a service such as the present is neither within the historic meaning of the phrase "duty of tonnage" nor the purpose of the constitutional prohibition.

It is unnecessary to consider other types of port charges, as for dredging or other forms of harbor improvement, with respect to which different considerations may apply.

2. The present fee to defray the cost of a purely local regulation of harbor traffic is not an objectionable burden on commerce. State regulations of harbor traffic, although they incidentally affect commerce, interstate or foreign, are of local concern. So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress, they are not forbidden. \* \* \* And charges levied by state authority to defray the cost of regulation or of facilities afforded in aid of interstate or foreign commerce have consistently been held to be permissible. Such charges were considered and upheld in *Keokuk Northern Line Packet Co. v. Keokuk*, supra; *Morgan's Louisiana & T. R. & S. S. Co. v. Board of Health*, supra; *Parkersburg & O. River Transportation Co. v. Parkersburg*, supra, 107 U.S. 691, 701, et seq., 2 S.Ct. 732, 27 L.Ed. 584; *Ouachita & M. River Packet Co. v. Aiken*, supra, 121 U.S. 444, 448, et seq., 7 S.Ct. 907, 30 L.Ed. 976; *Huse v. Glover*, supra. See *Sands v. Manistee River Improvement Co.*, 123 U.S. 288, 8 S.Ct. 113, 31 L.Ed. 149. A similar exercise of state power is the imposition of inspection or license fees incident to or in support of local regulations of interstate commerce. *Patapsco Guano Co. v. Board of Agriculture*, 171 U.S. 345, 18 S.Ct. 862, 43 L.Ed. 191; *New Mexico ex rel. E. J. McLean & Co. v. Denver & Rio Grande R. Co.*, 203 U.S. 38, 54, 27 S.Ct. 1, 51 L.Ed. 78; *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U.S. 380, 32 S.Ct. 152, 56 L.Ed. 240; *Savage v. Jones*, 225 U.S. 501, 32 S.Ct. 715, 56 L.Ed. 1182; *Merchants' Exchange v. Missouri*, 248 U.S. 365, 39 S.Ct. 114, 63 L.Ed. 300; *Pure Oil Co. v. Minnesota*, 248 U.S. 158, 39 S.Ct. 35, 63 L.Ed. 180. Its most recent manifestation is the levy of a tax which represents a reasonable charge upon interstate automobile traffic passing over state highways, upheld in *Kane v. New Jersey*, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222; *Clark v. Poor*, 274

U.S. 554, 47 S.Ct. 702, 71 L.Ed. 1199; *Interstate Busses Corporation v. Blodgett*, 276 U.S. 245, 48 S.Ct. 230, 72 L.Ed. 551; *Hendrick v. Maryland*, 235 U.S. 610, 35 S.Ct. 140, 59 L.Ed. 383.

Affirmed.

#### NOTE

1. Const.U.S. art. 1, § 10, prohibits states from laying imposts or duties on imports or exports, without the consent of Congress. It also provides that the "net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress." For a recent case discussing said provision, see *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 683 (1946).

## CHAPTER 10

### OTHER FEDERAL LEGISLATIVE POWERS

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#### CONTINENTAL ILLINOIS NAT. BANK & TRUST CO. v. CHICAGO, R. I. & P. R. Co.

Supreme Court of the United States, 1935. 294 U.S. 648, 55 S.Ct. 595,  
79 L.Ed. 1110.

Proceedings under the Bankruptcy Act by the Chicago, Rock Island & Pacific Railway Company, debtor, in which nine of the debtor's subsidiaries thereafter joined. Decree enjoining the Continental Illinois National Bank & Trust Company of Chicago, the Chase National Bank of the City of New York, the Mississippi Valley Trust Company, the Harris Trust & Savings Bank, the New York Trust Company, and the Reconstruction Finance Corporation from selling collateral which debtor had pledged as security for loans, was affirmed by the Circuit Court of Appeals for the Seventh Circuit [In re Chicago, R. I. & P. Ry. Co., 72 F. 2d 443], and each of such pledgees brings certiorari.

Affirmed.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

\* \* \*

By the Act of March 3, 1933, c. 204, 47 Stat. 1467, see 11 U.S.C.A. §§ 201 and note, 202-205, original jurisdiction, in addition to that theretofore exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, was conferred upon courts of bankruptcy "in proceedings for the relief of debtors," as provided in sections 74, 75 and 77 of the act, 11 U.S.C.A. §§ 202, 203, and 205. We are here concerned only with section 77, 11 U.S.C.A. § 205. That section contains provisions for the reorganization of railroads engaged in interstate commerce.

\* \* \*

The questions which we are called upon to determine relate to the construction of section 77 in certain particulars; to its constitutionality; and to the powers of the district court which were here asserted and exercised.

First. The constitutional validity of the section in its general scope and application is not assailed, the subject being passed without discussion by any of the parties. Nevertheless, grave

doubt has been expressed in respect of that question; and since the question is inherently fundamental, we deem it necessary to consider and dispose of it in limine—postponing, however, for later consideration the limited contention of the banks, in which the Reconstruction Finance Corporation seems not to join, that the due process clause of the Constitution is infringed by the special application made of section 77 in respect of the injunction.

Article 1, § 8, cl. 4, of the Federal Constitution, U.S.C.A.Const. art. 1, § 8, cl. 4, vests Congress with the power “to establish \* \* \* uniform Laws on the subject of Bankruptcies throughout the United States”; and the simple question is: Does section 77 constitute a law on the subject of bankruptcies? While attempts have been made to formulate a distinction between bankruptcy and insolvency, it long has been settled that, within the meaning of the constitutional provision, the terms are convertible. As early as 1833, Mr. Justice Story said that whatever might have been the rule of the English law on the subject, Congress might pass an act authorizing a commission of bankruptcy at the petition of the debtor; and that no distinction, practically or even theoretically, could be made between bankruptcies and insolvencies. 2 Story on the Constitution (4th Ed.) § 1111. From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power.

The English law of bankruptcy, as it existed at the time of the adoption of the Constitution, was conceived wholly in the interest of the creditor and proceeded upon the assumption that the debtor was necessarily to be dealt with as an offender. Anything in the nature of voluntary bankruptcy was unknown to that system. The persons who were permitted to fall within the term “bankrupt” were limited to traders. But the notion that the framers of the Constitution, by the bankruptcy clause, intended to limit the power of Congress to the then existing English law and practice upon the subject long since has been dispelled.

In *Waring v. Clarke*, 5 How. 441, 12 L.Ed. 226, this court held that the grant extending the judicial power to all cases of admiralty and maritime jurisdiction was not limited to, and was not to be interpreted by, what were cases of admiralty jurisdiction in England when the Constitution was adopted. Nor is the implied power of Congress over the subject arising from that jurisdictional clause and the general coefficient clause (article 1, § 8, cl. 18) of the Constitution to be thus confined. *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 42–43, 55 S.Ct. 31, 79

L.Ed. 176; *Panama R. R. Co. v. Johnson*, 264 U.S. 375, 385-387, 44 S.Ct. 391, 68 L.Ed. 748.

The same, it was said in the *Waring Case*, is true in respect of other grants of power; and the bankruptcy clause was cited, page 458 of 5 How., 12 L.Ed. 226, as an example. In the *Matter of Edward Klein*, decided by Mr. Justice Catron sitting on circuit and printed in 1 How., 42 U.S. 277, Note, Fed.Cas.No. 7865, it was definitely decided that the extent of the power of Congress was not limited to the principle upon which the English bankruptcy system was founded; and that decision was cited with approval by this court in *Hanover National Bank v. Moyses*, 186 U.S. 181, 186, 22 S.Ct. 857, 46 L.Ed. 1113. Whether a clause in the Constitution is to be restricted by the rules of the English law as they existed when the Constitution was adopted depends upon the terms or the nature of the particular clause in question. Certainly, these rules have no such restrictive effect in respect of any constitutional grant of governmental power (*Waring v. Clarke*, *supra*), though they do, at least in some instances, operate restrictively in respect of clauses of the Constitution which guarantee and safeguard the fundamental rights and liberties of the individual, the best examples of which, perhaps, are the Sixth and Seventh Amendments, which guarantee the right of trial by jury. That guaranty has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements recognized in this country and England when the Constitution was adopted. *Patton v. United States*, 281 U.S. 276, 288, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263, and cases cited. See, also, *Callan v. Wilson*, 127 U.S. 540, 549, 8 S.Ct. 1301, 32 L.Ed. 223; *Dimick v. Schiedt*, 293 U.S. 474, 476, 487, 55 S.Ct. 296, 79 L.Ed. 603, 95 A.L.R. 1150; *West v. Gammon et al.* (C.C.A.) 98 F. 426.

But, while it is true that the power of Congress under the bankruptcy clause is not to be limited by the English or Colonial law in force when the Constitution was adopted, it does not follow that the power has no limitations. Those limitations have never been explicitly defined, and any attempt to do so now would result in little more than a paraphrase of the language of the Constitution without advancing far toward its full meaning. Judge Cowen, in *Kunzler v. Kohaus*, 5 Hill, N.Y., 317, 321, a decision which was approved by this court in *Hanover National Bank v. Moyses*, *supra*, said that the power was the same as though Congress had been authorized "to establish uniform laws on the subject of any person's general inability to pay his debts.

\* \* \* " Probably the most satisfactory approach to the prob-

lem of interpretation here involved is to examine it in the light of the acts, and the history of the acts, of Congress which have from time to time been passed on the subject; for, like many other provisions of the Constitution, the nature of this power and the extent of it can best be fixed by the gradual process of historical and judicial "inclusion and exclusion." Compare *Davidson v. New Orleans*, 96 U.S. 97, 104, 24 L.Ed. 616; *Fed. Trade Comm. v. Raladam Co.*, 283 U.S. 643, 648, 51 S.Ct. 587, 75 L.Ed. 1324, 79 A.L.R. 1191.

The first act, that of 1800 (2 Stat. 19) so far ignored the English law, which was confined to traders, as to include bankers, brokers, and underwriters as well. The act of 1841 (5 Stat. 440) added merchants; and other additions have been made by later acts until now practically all classes of persons and corporations are included. See *Friday v. Hall & Kaul Co.*, 216 U.S. 449, 454, 30 S.Ct. 261, 54 L.Ed. 562, 26 L.R.A.,N.S., 475. The act of 1800 was one exclusively in the interest of the creditor. But the act of 1841 took what then must have been regarded as a radical step forward by conferring upon the debtor the right by voluntary petition to surrender his property, with some exceptions, and relieve himself of all future liability in respect of past debts. The act of 1800, like the English law, was conceived in the view that the bankrupt was dishonest; while the act of 1841 and the later acts proceeded upon the assumption that he might be honest but unfortunate. One of the primary purposes of these acts was to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes," and to give him "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230, 93 A.L.R. 195.

By the Act March 2, 1867, p. 567, § 43, as amended by the Act of 1874, c. 390, § 17, 18 Stat. 178, 182, the debtor for the first time was permitted, either before or after an adjudication in bankruptcy, to propose terms of composition to his creditors to become binding upon their acceptance by a designated majority and confirmation by the judge.

The fundamental and radically progressive nature of these extensions becomes apparent upon their mere statement; but all have been judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution. Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions

as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed.

Section 77 advances another step in the direction of liberalizing the law on the subject of bankruptcies. Railway corporations had been definitely excluded from the operation of the law in 1910 (chapter 412, § 4, 36 Stat. 838, 839, 11 U.S.C.A. § 22), probably because such corporations could not be liquidated in the ordinary way or by a distribution of assets. A railway is a unit; it can not be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities can not be halted because its continuous, uninterrupted operation is necessary in the public interest; and, for the preservation of that interest, as well as for the protection of the various private interests involved, reorganization was evidently regarded as the most feasible solution whenever the corporation had become "insolvent or unable to meet its debts as they mature."

Equity receiverships, resorted to for that purpose, have never been satisfactory for many reasons. Partly, no doubt, in recognition of that situation, Congress, by section 77, added railroad corporations to the category of those who might have relief by legislation passed in virtue of the bankruptcy clause of the Constitution; and determined, after consideration, that such relief to be effectual should take the form of a reorganization, and should extend to cases where the corporation is "unable to meet its debts as they mature." The last phrase, since it is used as an alternative for the word "insolvent," obviously means something less than a condition of "bankruptcy" or "insolvency" as those words are employed in the law. See Bankruptcy Act, § 1(15), 11 U.S.C.A. § 1(15), which defines an "insolvent" as one whose assets, at a fair valuation, are not sufficient to pay his debts. It may be construed to include a debtor who, although unable to pay promptly, may be able to pay if time to do so be sufficiently extended. Obviously, section 77 does no more than follow the line of historical and progressive development projected by previous acts.

As outlined by that section, a plan of reorganization, when confirmed, cannot be distinguished in principle from the composition with creditors authorized by the act of 1867, as amended by the act of 1874. It is not necessary to the validity of either that the proceeding should result in an adjudication of

bankruptcy. The constitutionality of the old provision for a composition is not open to doubt. In *re Reiman*, 20 Fed.Cas. pages 490, 496, 497, No. 11,673, cited with approval in *Hanover National Bank v. Moyses*, *supra*. That provision was there sustained upon the broad ground that the "subject of bankruptcies" was nothing less than "the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief." That it was not necessary for the proceedings to be carried through in bankruptcy was held not to warrant the objection that the provision did not constitute a law on the subject of bankruptcies. The same view sustains the validity of section 77. Both contemplate an adjustment of a failing debtor's obligations; and although actual bankruptcy may not supervene in either, they are none the less laws on the subject of bankruptcies. With due regard for consistency, the constitutional validity of the one cannot well be sustained and that of the other denied, as this court quite evidently recognized in *Canada Southern R. Co. v. Gebhard*, 109 U.S. 527, 3 S.Ct. 363, 366, 27 L.Ed. 1020.

That case involved an act of the Canadian Parliament by which railway companies unable to meet their engagements might unite with their creditors in the preparation of "schemes of arrangement" to be filed in the court of chancery. A scheme was deemed agreed to by the holders of mortgages, bonds, stocks, rent charges, and preferred shares when assented to in writing by a designated majority of the holders of each class of security. The scheme when confirmed by the court became binding upon the nonassenting minority and this court held it to be thus binding upon bondholders who were citizens of the United States and who sued in courts of the United States to recover on their bonds. The "scheme" of the Canadian law was not unlike the "plan" of section 77. The significant part of the court's opinion, so far as the question now under discussion is concerned, is the following, which appears at page 536 of 109 U.S., 3 S.Ct. 363, 369: "The confirmation and legalization of 'a scheme of arrangement' under such circumstances is no more than is done in bankruptcy when a 'composition' agreement with the bankrupt debtor, if assented to by the required majority of creditors, is made binding on the non-assenting minority. In no just sense do such governmental regulations deprive a person of his property without due process of law. They simply require each individual to so conduct himself for the general good as not unnecessarily to injure another. Bankrupt laws have been in force in England for more than three centuries and they had their origin in the Roman law. The constitution

expressly empowers the congress of the United States to establish such laws. Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained. Such concessions make up the consideration he gives for the obligation of the body politic to protect him in life, liberty, and property. Bankrupt laws, whatever may be the form they assume, are of that character."

After pointing out that the Canadian law was in accordance with the policy of the English and Canadian governments in dealing with embarrassed and insolvent railway companies; that it took the place in England and Canada of foreclosure sales in the United States "which in general accomplish substantially the same result with more expense and greater delay," the court added (page 539 of 109 U.S., 3 S.Ct. 363, 371): "\* \* \* It is in entire harmony with the spirit of bankrupt laws, the binding force of which, upon those who are subject to the jurisdiction, is recognized by all civilized nations. It is not in conflict with the Constitution of the United States, which, although prohibiting states from passing laws impairing the obligation of contracts, allows congress 'to establish \* \* \* uniform laws on the subject of bankruptcy throughout the United States.' Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized, the scheme may fail."

It is unnecessary to consider the criticism sometimes made, that these excerpts are dicta merely, since we are of opinion that they are sound in principle.

It follows, from what has now been said, that section 77, in its general scope and aim, is within the power conferred by the bankruptcy clause of the Constitution; and we so hold. \* \* \*

Decree affirmed.

#### NOTE

1. The terms in which the bankruptcy power is conferred upon Congress require bankruptcy laws to be uniform throughout the United States. This requires geographical uniformity only; *Hanover Nat. Bank v. Moyses*, 186 U.S. 181, 22 S.Ct. 857, 46 L.Ed. 1113 (1903).

2. The extent to which the federal power includes provision for debt adjustments of municipal corporations and other state political units is discussed in *Ashton v. Cameron County Water Improvement District No. 1*, 298 U.S. 513, 56 S.Ct. 892, 80 L.Ed. 1309 (1936), and *U. S. v. Bekins*, 304 U.S. 27, 58 S.Ct. 811, 82 L.Ed. 1137 (1938).

3. The most important limitation on the exercise of the bankruptcy power is the due process clause of U.S.Const., Amend. 5. See following cases for discussions thereof: *Louisville Joint Stock*

Land Bank v. Radford, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593 (1935); Wright v. Vinton Branch of Mt. Trust Bank of Roanoke, 300 U.S. 440, 57 S.Ct. 556, 81 L.Ed. 736 (1937); Kuehner v. Irving Trust Co., 299 U.S. 445, 57 S.Ct. 298, 81 L.Ed. 340 (1937).

4. The grant to Congress of the power to enact bankruptcy laws has not deprived the states of the power to enact and enforce insolvency laws; Sturges v. Crowninshield, 4 Wheat. 122, 4 L.Ed. 529 (1819); Ogden v. Saunders, 12 Wheat. 213, 6 L.Ed. 606 (1827).

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### UNITED STATES v. CITY AND COUNTY OF SAN FRANCISCO.

Supreme Court of the United States, 1940.  
310 U.S. 16, 60 S.Ct. 749, 84 L.Ed. 1050.

Mr. Justice BLACK delivered the opinion of the Court.

By the Raker Act of December 19, 1913, Congress granted the City and County of San Francisco, subject to express conditions, certain lands and rights-of-way in the public domain in Yosemite National Park and Stanislaus National Forest. The Act in terms declared that this, known as the "Hetch-Hetchy" grant, was intended for use by the City both in constructing and maintaining a means of supplying water for the domestic purposes of the City and other public bodies, and in establishing a system "for generation and sale and distribution of electric energy."

Upon application of the Secretary of the Interior, the United States brought this suit in equity charging the city with disposing of power through the Pacific Gas & Electric Company, a private utility, in violation of Section 6 of the granting Act. Section 6 provides "That the grantee [the City] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States."

The District Court concluded that the City was violating Section 6 by the sale and distribution of Hetch-Hetchy power through the Pacific Gas & Electric Company, a private utility. Accordingly, the City was required by injunction alternatively to discontinue such disposal of the power or cease further use of the lands and rights granted it under the Act for generation and transmission of electric energy. The Circuit Court of Appeals reversed, finding that the private utility was merely acting as

the City's agent in the sale and distribution of Hetch-Hetchy power and holding that Section 6 does not prohibit such sale and distribution of that power by a private utility.

Here, as in the courts below, the City has defended the sale and distribution by Pacific Gas & Electric Company of power originating at Hetch-Hetchy upon the grounds that such disposition does not violate the prohibitions of Section 6; that imposition of these prohibitions was not within the constitutional authority of Congress; and that if Section 6 is valid and has been violated, the United States is not entitled to injunctive relief in equity.

*First. Prohibitions of Section 6.* In the City's view, Section 6 does not preclude private utilities from all participation in the ultimate sale and distribution of Hetch-Hetchy power. The City insists that the Section, so construed, does no more than prohibit the City from selling Hetch-Hetchy power to a private utility for resale to consumers and therefore permits consignment of the power to the Company, as agent of the City, for sale and distribution. On the contrary, the Government's position rests upon the claim that Pacific Gas & Electric Company is not in reality selling and distributing Hetch-Hetchy power as consignee and agent but as purchaser for resale; that the grant to the City was made upon the mandatory condition that this power be sold solely and exclusively by the City directly to consumers and without private profit in order to bring it into direct competition with adjacent privately owned utilities; and that Section 6 not only withholds the right of selling for resale but also prohibits the City "from ever selling or letting" to any private corporation "the right to sell or sublet the \* \* \* electric energy sold or given to it \* \* \*" by the City. The language of the Act, its background and its history require the construction given Section 6 by the Government. \* \* \*

Terminology of consignment of power, rather than of transfer by sale, and verbal description of the power company as the City's agent or consignee, are not sufficient to take the actions of the parties under the contract out of Section 6. Congress, in effect trustee of public lands for all the people, has by this Act sought to protect and control the disposition of a section of the public domain. The City has in fact followed a course of conduct which Congress, by Section 6, has forbidden. Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law. When we look behind the word description of the arrangement between the City and the power company to what was actually done, we see that the City

has—contrary to the terms of Section 6—abdicated its control over the sale and ultimate distribution of Hetch-Hetchy power. There remain only the determinations whether the prohibitions of Section 6 are constitutional and can be enforced in equity.

*Second.* The prohibitions of Section 6 are challenged by the City as an unconstitutional invasion of the rights of the State of California on the ground that they attempt to regulate the manner in which electricity shall be disposed of in San Francisco. And the City therefore insists that these prohibitions must be considered only as covenants in a contract between the City and the United States. Upon this premise, the City has argued here, as it did in the Court of Appeals, that alleged equitable defenses render the covenants unenforceable. \* \* \*

Article 4, Section 3, Cl. 2 of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The power over the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy. And the policy to govern disposal of rights to develop hydroelectric power in such public lands may, if Congress chooses, be one designed to avoid monopoly and to bring about a widespread distribution of benefits. The statutory requirement that Hetch-Hetchy power be publicly distributed does not represent an exercise of a general control over public policy in a State but instead only an exercise of the complete power which Congress has over particular public property entrusted to it. \* \* \*

The judgment of the Circuit Court is reversed. The judgment of the District Court is affirmed and we remand the case to it. It is so ordered.

Reversed.

#### NOTE

1. See also *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936).

2. The power of the United States to acquire territory, and to govern it, and the extent to which the Constitution applies to such territory, are discussed in *American Ins. Co. v. Cantor*, 1 Pet. 511, 7 L.Ed. 242 (1828); *Jones v. U. S.*, 137 U.S. 202, 11 S.Ct. 80, 34 L. Ed. 691 (1890); *De Lima v. Bidwell*, 182 U.S. 1, 21 S.Ct. 743, 45 L.Ed. 1041 (1901); *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770,

45 L.Ed. 1088 (1901). See F. R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 Col.L.Rev. 823 (1926).

3. The land beginning at low water mark on the California Coast and extending out for three miles into the Pacific was recently held to belong to the United States; *U. S. v. California*, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947).

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### KELLER v. UNITED STATES.

Supreme Court of the United States, 1909. 213 U.S. 138, 29 S.Ct. 470,  
53 L.Ed. 737, 16 Ann.Cas. 1066.

[Error to the federal District Court for the Northern District of Illinois. A federal statute (Act Feb. 20, 1907, c. 1134, 34 Stat. 898, 899) made it a felony for any person to harbor for any immoral purpose any alien female within three years after her entry into the United States, and provided for the deportation of any alien female found practicing prostitution within this period. Defendant had purchased a house of prostitution in Chicago in which there was at the time an alien Hungarian woman within the terms of this statute, and defendant was convicted of knowingly harboring said woman thereafter.]

Mr. Justice BREWER. \* \* \* It is unnecessary to determine how far Congress may go in legislating with respect to the conduct of an alien while residing here, for there is no charge against one; nor to prescribe the extent of its power in punishing wrongs done to an alien, for there is neither charge nor proof of any such wrong. So far as the statute or the indictment requires, or the testimony shows, she was voluntarily living the life of a prostitute, and was only furnished a place by the defendants to follow her degraded life. While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the state. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the states, for there is in the Constitution no grant thereof to Congress. \* \* \* [Here follow quotations from various cases.]

The question is, therefore, whether there is any authority conferred upon Congress by which this particular portion of the statute can be sustained. By section 2 of article 2 of the Constitution, U.S.C.A.Const. art. 2, § 2, power is given to the President, by and with the advice and consent of the Senate, to make treaties, but there is no suggestion in the record or in the briefs of a treaty with the king of Hungary under which this legislation can be supported.

The general power which exists in the nation to control the coming in or removal of aliens is relied upon, the government stating in its brief these two propositions: "The clause in question should be held valid because it relates to and materially affects the conditions upon which an alien female may be permitted to remain in this country, and the grounds which warrant her exclusion. \* \* \* The validity of the provision in question should be determined from its general effect upon the importation and exclusion of aliens."

But it is sufficient to say that the act charged has no significance in either direction. \* \* \* The act charged is only one included in the great mass of personal dealings with aliens. It is her own character and conduct which determine the question of exclusion or removal. The acts of others may be evidence of her business and character. But it does not follow that Congress has the power to punish those whose acts furnish evidence from which the government may determine the question of her expulsion. Every possible dealing of any citizen with the alien may have more or less induced her coming. But can it be within the power of Congress to control all the dealings of our citizens with resident aliens? If that be possible, the door is open to the assumption by the national government of an almost unlimited body of legislation. By the census of 1900 the population of the United States between the oceans was, in round numbers, 76,000,000. Of these, 10,000,000 were of foreign birth, and 16,000,000 more were of foreign parentage. Doubtless some have become citizens by naturalization, but certainly scattered through the country there are millions of aliens. If the contention of the government be sound, whatever may have been done in the past, however little this field of legislation may have been entered upon, the power of Congress is broad enough to take cognizance of all dealings of citizens with aliens. \* \* \* Although Congress has not largely entered into this field of legislation, it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution. While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. \* \* \*

Judgment reversed.

Mr. Justice HOLMES [with whom concurred HARLAN and MOODY, JJ.], dissenting: For the purpose of excluding those who unlawfully enter this country Congress has power to retain control over aliens long enough to make sure of the facts. Japanese Immigrant Case, *Yamataya v. Fisher*, 189 U.S. 86, 23 S.Ct. 611,

47 L.Ed. 721. To this end it may make their admission conditional for three years. *Pearson v. Williams*, 202 U.S. 281, 26 S.Ct. 608, 50 L.Ed. 1029. If the ground of exclusion is their calling, practice of it within a short time after arrival is or may be made evidence of what it was when they came in. \* \* \* And, while a period of three years seems to be long, I am not prepared to say, against the judgment of Congress, that it is too long. \* \* \* I think that Congress may require, as a condition of the right to remain, good behavior for a certain time, in matters deemed by it important to the public welfare, and of a kind that indicates a pre-existing habit that would have excluded the party if it had been known. Therefore I am of opinion that it is within the power of Congress to order the deportation of a woman found practicing prostitution within three years.

If Congress can forbid the entry and order the subsequent deportation of professional prostitutes, it can punish those who cooperate in their fraudulent entry. "If Congress has power to exclude such laborers \* \* \* it has the power to punish any who assist in their introduction." That was a point decided in *Lees v. United States*, 150 U.S. 476, 480, 14 S.Ct. 163, 164, 37 L. Ed. 1150, 1151. The same power must exist as to co-operation in an equally unlawful stay. The indictment sets forth the facts that constitute such co-operation, and need not allege the conclusion of law. On the principle of the cases last cited, in order to make its prohibition effective, the law can throw the burden of finding out the fact and date of a prostitute's arrival from another country upon those who harbor her for a purpose that presumably they know, in any event, to be contrary to law. Therefore, while I have admitted that the time fixed seems to me to be long, I can see no other constitutional objection to the act, and, as I have said, I think that that one ought not to prevail.

#### NOTE

1. Congress has the power to provide for the deportation of aliens; *Fong Yue Ting v. U. S.*, 149 U.S. 698, 13 S.Ct. 1016, 37 L. Ed. 905 (1893).

2. The extent to which the exercise by Congress of its power over aliens prevents the enforcement of state control legislation is discussed in *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

3. That Congress may provide that a native born woman citizen of the United States shall lose her citizenship by marriage to an alien is established by *Mackenzie v. Hare*, 239 U.S. 299, 36 S.Ct. 106, 60 L.Ed. 297 (1916).

4. Congress has the exclusive power to provide for the naturalization of aliens; Const.U.S. Art. 1, § 8, Cl. 4.

## SELECTIVE DRAFT LAW CASES.

Supreme Court of the United States, 1918. 245 U.S. 366, 38 S.Ct. 159.  
62 L.Ed. 349, L.R.A.1918C, 361, Ann.Cas.1918B, 856.

[In Error to the United States District Court for the District of Minnesota. Defendant was convicted of failing to present himself for registration under the Act of May 18, 1917, c. 15 (40 Stat. 76) which was an act to raise a national army of the United States (by draft or conscription, among other means) to fight in the war against Germany. From judgment of conviction defendant brings error. Affirmed.]

Mr. Chief Justice WHITE. \* \* \* The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power "to declare war; \* \* \* to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; \* \* \* to make rules for the government and regulation of the land and naval forces." Article 1, § 8, U.S.C.A.Const. art. 1, § 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Article 1, § 8.

As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice. It is said, however, that since under the Constitution as originally framed state citizenship was primary and United States citizenship but derivative and dependent thereon, therefore the power conferred upon Congress to raise armies was only coterminous with United States citizenship and could not be exerted so as to cause that citizenship to lose its dependent character and dominate state citizenship. But the proposition simply denies to Congress the power to raise armies which the Constitution gives. That power by the very terms of the Constitution, being delegated, is supreme. Article 6, U.S.C.A.Const. art. 6. In truth the contention simply assails the wisdom of the framers of the Constitution in conferring authority on Congress and in not retaining it as it was under the Confederation in the several states. Further it is said, the right to provide is not denied by calling for volunteer enlistments, but it does not and cannot include the power to exact enforced mili-

tary duty by the citizen. This, however, but challenges the existence of all power, for a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power.

It is argued, however, that although this is abstractly true, it is not concretely so because as compelled military service is repugnant to a free government and in conflict with all the great guarantees of the Constitution as to individual liberty, it must be assumed that the authority to raise armies was intended to be limited to the right to call an army into existence counting alone upon the willingness of the citizen to do his duty in time of public need, that is, in time of war. But the premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion. Let us see if this is not at once demonstrable. It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need, and the right to compel it. Vattel, *Law of Nations*, book III, cc. 1 and 2. To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force. In England it is certain that before the Norman Conquest the duty of the great militant body of the citizens was recognized and enforceable. Blackstone, book I, c. 13. It is unnecessary to follow the long controversy between Crown and Parliament as to the branch of the government in which the power resided, since there never was any doubt that it somewhere resided. So also it is wholly unnecessary to explore the situation for the purpose of fixing the sources whence in England it came to be understood that the citizen or the force organized from the militia as such could not without their consent be compelled to render service in a foreign country, since there is no room to contend that such principle ever rested upon any challenge of the right of Parliament to impose compulsory duty upon the citizen to perform military duty wherever the public exigency exacted whether at home or abroad. This is exemplified by the present English Service Act.

In the Colonies before the separation from England there cannot be the slightest doubt that the right to enforce military service was unquestioned and that practical effect was given to the power in many cases. Indeed the brief of the government contains a list of Colonial Acts manifesting the power and its enforcement in more than two hundred cases. And this exact situation existed also after the separation. Under the Articles of Confederation it is true Congress had no such power, as its au-

thority was absolutely limited to making calls upon the states for the military forces needed to create and maintain the army, each state being bound for its quota as called. But it is indisputable that the states in response to the calls made upon them met the situation when they deemed it necessary by directing enforced military service on the part of the citizens. In fact the duty of the citizen to render military service and the power to compel him against his consent to do so was expressly sanctioned by the Constitutions of at least nine of the states, an illustration being afforded by the following provision of the Pennsylvania Constitution of 1776: "That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion toward the expense of that protection, and yield his personal service when necessary, or an equivalent thereto." Article 8 (Thorpe, *American Charters, Constitutions and Organic Laws*, vol. 5, pp. 3081, 3083).

While it is true that the states were sometimes slow in exerting the power in order to fill their quotas—a condition shown by resolutions of Congress calling upon them to comply by exerting their compulsory power to draft and by earnest requests by Washington to Congress that a demand be made upon the states to resort to drafts to fill their quotas—that fact serves to demonstrate instead of to challenge the existence of the authority. A default in exercising a duty may not be resorted to as a reason for denying its existence.

When the Constitution came to be formed it may not be disputed that one of the recognized necessities for its adoption was the want of power in Congress to raise an army and the dependence upon the states for their quotas. In supplying the power it was manifestly intended to give it all and leave none to the states, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the states, without the consent of Congress, from keeping troops in time of peace or engaging in war. Article 1, § 10, U.S.C.A.Const. art. 1, § 10. \* \* \*

Thus sanctioned as is the act before us by the text of the Constitution, and by its significance as read in the light of the fundamental principles with which the subject is concerned, by the power recognized and carried into effect in many civilized countries, by the authority and practice of the colonies before the Revolution, of the states under the Confederation and of the government since the formation of the Constitution, the want of merit in the contentions that the act in the particulars which we have been previously called upon to consider was beyond the constitutional power of Congress, is manifest. Cogency, however, if possible, is added to the demonstration by pointing out

that in the only case to which we have been referred where the constitutionality of the act of 1863 was contemporaneously challenged on grounds akin to, if not absolutely identical with, those here urged, the validity of the act was maintained for reasons not different from those which control our judgment. *Kneedler v. Lane*, 45 Pa. 238. \* \* \*

We pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred because we think its unsoundness is too apparent to require us to do more.

Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement. Affirmed.

#### NOTE

1. Harrop Freeman, *The Constitutionality of Peacetime Conscription*, 31 Va.L.Rev. 40 (1944); W. R. Montgomery, *The Relation of the Militia Clause to the Constitutionality of Peacetime Compulsory Universal Military Training*, 31 Va.L.Rev. 628 (1945).
2. E. A. Gilmore, *War Power—Executive Power and the Constitution*, 29 Ia.L.Rev. 463 (1944).

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#### TOYOSABURO KOREMATSU v. UNITED STATES.

Supreme Court of the United States, 1944.  
323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194.

Mr. Justice BLACK delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area", contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western

Command, U. S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed, and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, 18 U.S.C.A. § 97a, which provides that " \* \* \* whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense."

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066, 7 Fed.Reg. 1407. That order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. \* \* \*"

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p. m. to 6 a. m. As is the case with the exclusion order here, that prior curfew order was designed as a

"protection against espionage and against sabotage." In *Kiyoshi Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774, we sustained a conviction obtained for violation of the curfew order. The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the Hirabayashi case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the Hirabayashi case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p. m. to 6. a. m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our Hirabayashi opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case the petitioner challenges the assumptions upon which we rested our conclusions in the Hirabayashi case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions we are compelled to reject them.

Here, as in the *Hirabayashi* case, *supra*, 320 U.S. at page 99, 63 S.Ct. at page 1385, 87 L.Ed. 1774, “\* \* \* we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.”

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.

We uphold the exclusion order as of the time it was made and when the petitioner violated it. \* \* \* In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. Cf. *Ex parte Kumezo Kawato*, 317 U.S. 69, 73, 63 S.Ct. 115, 117, 87 L.Ed. 58. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger. \* \* \*

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Affirmed.

Messrs. Justices MURPHY and JACKSON dissented.

#### NOTE

1. An extended discussion of the extent to which civilian citizens are subject to trial by military courts will be found in *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304, 66 S.Ct. 606, 90 L.Ed. 688 (1946), in which the majority of the Supreme Court avoided decision on constitutional issues raised by petitioner. See Nannette Dembitz, *Racial Discrimination and Military Judgment—The Supreme Court's Korematsu and Endo Decisions*, 45 Col.L.Rev. 175 (1945); Charles Fairman,

The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case, 59 Harv.L.Rev. 833 (1946); J. P. Frank, *Ex Parte Milligan versus The Five Companies: Martial Law in Hawaii*, 44 Col.L.Rev. 639 (1944).

2. For discussion of the trial of enemy aliens who were members of the armed forces of nations with which the United States was at war, see *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3 (1942); *Application of Yamashita*, 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946). See Note, *Saboteurs and the Jurisdiction of Military Commissions*, 41 Mich.L.Rev. 481 (1943); C. F. Barber, *Trial of Unlawful Enemy Belligerents*, 29 Cornell L.Quar. 53 (1943).

3. That the war power justifies federal legislation necessary and proper to adjust the dislocations in the national economy due to war was held in *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 68 S.Ct. 421, — L.Ed. — (1948).

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### MISSOURI v. HOLLAND.

Supreme Court of the United States, 1920. 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641, 11 A.L.R. 984.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, c. 128, 40 Stat. 755, 16 U.S.C.A. § 703 et seq., and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, U.S.C.A.Const. amend. 10, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes. The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State. *Kansas v. Colorado*, 185 U.S. 125, 142, 22 S.Ct. 552, 46 L.Ed. 838; *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237, 27 S.Ct. 618, 51 L.Ed. 1038, 11 Ann.Cas. 488; *Marshall Dental Manufacturing Co. v. Iowa*, 226 U.S. 460, 462, 33 S.

Ct. 168, 57 L.Ed. 300. A motion to dismiss was sustained by the District Court on the ground that the Act of Congress is constitutional. 258 F. 479. *Acc. United States v. Thompson, D.C., 258 F. 257; United States v. Rockefeller, D.C., 260 F. 346.* The State appeals.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed many parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified closed seasons and protection in other forms, and agreed that the two powers would take or propose to their lawmaking bodies the necessary measures for carrying the treaty out. 39 Stat. 1702. The above mentioned act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture. Regulations were proclaimed on July 31, and October 25, 1918. 40 Stat. 1812, 1863. It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, U.S.C.A.Const. art. 2, § 2, the power to make treaties is delegated expressly, and by Article 6, U.S.C.A.Const. art. 6, treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, U.S.C.A.Const. art. 1, § 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the

killing of migratory birds within the States had been held bad in the District Court. *United States v. Shauver*, 214 F. 154. *United States v. McCullagh*, 221 F. 288. Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. *Andrews v. Andrews*, 188 U.S. 14, 33, 23 S.Ct. 237, 47 L.Ed. 366. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.

The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties of course "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States." *Baldwin v. Franks*, 120 U.S. 678, 683, 7 S.Ct. 656, 657, 32 L.Ed. 766. No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it was recognized as early as *Hopkirk v. Bell*, 3 Cranch, 454, 2 L.Ed. 497, with regard to statutes of limitation, and even earlier, as to confiscation, in *Ware v. Hylton*, 3 Dall. 199, 1 L.Ed. 568. It was assumed by Chief Justice Marshall with regard to the escheat of land to the State in *Chirac v. Chirac*, 2 Wheat. 259, 275, 4 L.Ed. 234; *Hauenstein v. Lynham*, 100 U.S. 483, 25 L.Ed. 628; *DeGeofroy v. Riggs*, 133 U.S. 258, 10 S.Ct. 295, 33 L.Ed. 642; *Blythe v. Hinckley*, 180 U.S. 333, 340, 21 S.Ct. 390, 45 L.Ed. 557. So as to a limited jurisdiction of foreign consuls within a State *Wildenhus' Case*, 120 U.S. 1, 7 S.Ct. 385, 30 L.Ed. 565. See *Ross v. McIntyre*, 140 U.S. 453, 11 S.Ct. 897, 35 L.Ed. 581. Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein.

But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. *Carey v. South Dakota*, 250 U.S. 118, 39 S.Ct. 403, 63 L.Ed. 886.

Decree affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice PITNEY dissent.

#### NOTE

1. Const.U.S., Art. 2, § 2, Cl. 2, confers upon the President the power "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." The provisions of a treaty constitute part of the supreme law of the land, and supersede inconsistent Congressional legislation, *Foster v. Neilson*, 2 Pet. 253, 7 L.Ed. 415 (1829). So far as it regulates matters which may also be regulated by Congress, its provisions can be repealed by a subsequent Act of Congress, *Head Money Cases*, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798 (1884). The provisions of a treaty also supersede inconsistent state laws, *Hauenstein v. Lynham*, 100 U.S. 483, 25 L.Ed. 628 (1880); and conflicting state policies, *U. S. v. Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937).

2. The Supreme Court has never yet held any provision of a treaty or executive agreement violative of any federal Constitutional provision, or beyond the scope of the treaty-making power or the powers of the United States in the field of foreign affairs; see *U. S. v. Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937); *U. S. v. Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942). See also *J. L. Jackson, The Tenth Amendment Versus the Treaty Making Power Under the Constitution of the United States*, 14 Va.L.Rev. 331, 441 (1928); *A. K. Kuhn, The Treaty Making Power and the Reserved Sovereignty of the States*, 7 Col.L.Rev. 172 (1907).

3. See as to the legality of executive agreements the two cases cited in note 2, and the following: *Edwin Borchard, Shall the Executive Agreement Replace the Treaty?* 53 Yale L.Jour. 664 (1944); *M. S. McDougal and A. Lans, Treaties and Congressional-Executive or Presidential Agreements; Interchangeable Instruments of National Policy*, 54 Yale L.Jour. 181, 534 (1945); *Edwin Borchard, Treaties and Executive Agreements—A Reply*, 54 Yale L.Jour. 616 (1945).

4. On the general subject of control of the foreign affairs of the United States, see *D. M. Levitan, The Foreign Relations Powers: An Analysis of Mr. Justice Sutherland's Theory*, 55 Yale L.Jour. 467 (1946); *Stefan Riesenfeld, The Power of Congress and the President in International Relations*, 25 Calif.L.Rev. 643 (1937); *W. E. Mikell, The Extent of the Treaty Making Power of the President and Senate*, 57 U.Pa.L.Rev. 435, 528 (1909). Mr. Justice Sutherland's theory is found in *U. S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936).

## CHAPTER 11

# THE AMENDMENT OF THE FEDERAL CONSTITUTION

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### UNITED STATES v. SPRAGUE.

Supreme Court of the United States, 1931. 282 U.S. 716, 51 S.Ct. 220,  
75 L.Ed. 640, 71 A.L.R. 1381.

Mr. Justice ROBERTS delivered the opinion of the Court.

The United States prosecutes this appeal from an order of the District Court (U.S.C. tit. 18, § 682; tit. 28, § 345, 18 U.S.C.A. § 682; 28 U.S.C.A. § 345), quashing an indictment which charged appellees with unlawful transportation and possession of intoxicating liquors in violation of section 3 of title 2 of the National Prohibition Act (U.S.C. tit. 27, § 12, 27 U.S.C.A. § 12).

That court held that the Eighteenth Amendment, U.S.C.A. Const. Amend. 18, by authority of which the statute was enacted has not been ratified so as to become part of the Constitution.

The appellees contended in the court below, and here, that notwithstanding the plain language of article 5, U.S.C.A. Const. art. 5, conferring upon the Congress the choice of method of ratification, as between action by legislatures and by conventions, this Amendment could only be ratified by the latter.

They say that it was the intent of its framers, and the Constitution must, therefore, be taken impliedly to require, that proposed amendments conferring on the United States new direct powers over individuals shall be ratified in conventions; and that the Eighteenth is of this character. They reach this conclusion from the fact that the framers thought that ratification of the Constitution must be by the people in convention assembled and not by legislatures, as the latter were incompetent to surrender the personal liberties of the people to the new national government. From this and other considerations, hereinafter noticed, they ask us to hold that article 5 means something different from what it plainly says.

In addition they urge, that if there be any doubt as to the correctness of their construction of article 5, the Tenth Amendment, U.S.C.A. Const. art. 5, Amend. 10, removes it.

The District Court refused to follow this reasoning. It quashed the indictment, not as a result of analysis of article 5 and Amendment 10, but by resorting to "political science," the "political thought" of the times, and a "scientific approach to the problem of government." These, it thought, compelled it to declare the convention method requisite for ratification of an amendment such as the Eighteenth. The appellees do not attempt to justify the lower court's action by the reasons it states, but by resubmitting to us those urged upon that court and by it rejected.

The United States asserts that article 5 is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction. A mere reading demonstrates that this is true. It provides two methods for proposing amendments. Congress may propose them by a vote of two-thirds of both houses; or, on the application of the legislatures of two-thirds of the States, must call a convention to propose them. Amendments proposed in either way become a part of the Constitution, "when ratified by the Legislatures of three-fourths of the several States or by Conventions in three-fourths thereof, *as the one or the other Mode of Ratification may be proposed by the Congress.* \* \* \*"

The choice, therefore, of the mode of ratification, lies in the sole discretion of Congress. Appellees, however, point out that amendments may be of different kinds, as e. g., mere changes in the character of federal means or machinery, on the one hand, and matters affecting the liberty of the citizen on the other. They say that the framers of the Constitution expected the former sort might be ratified by legislatures, since the States as entities would be wholly competent to agree to such alterations, whereas they intended that the latter must be referred to the people because not only of lack of power in the legislatures to ratify, but also because of doubt as to their truly representing the people. Counsel advert to the debates in the convention which had to do with the submission of the draft of the Constitution to the legislatures or to conventions, and show that the latter procedure was overwhelmingly adopted. They refer to many expressions in contemporary political literature and in the opinions of this court to the effect that the Constitution derives its sanctions from the people and from the people alone. In spite of the lack of substantial evidence as to the reasons for the changes in statement of article 5 from its proposal until it took final form in the finished draft, they seek to import into the language of the article dealing with amendments, the views of the convention with respect to the proper method of ratification of the instrument as a whole. They say that if the legislatures were considered incompetent to surrender the people's liberties when the

ratification of the Constitution itself was involved, a fortiori they are incompetent now to make a further grant. Thus, however clear the phraseology of article 5, they urge we ought to insert into it a limitation on the discretion conferred on the Congress, so that it will read, "as the one or the other mode of ratification may be proposed by the Congress, as may be appropriate in view of the purpose of the proposed amendment." This can not be done.

The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 4 L.Ed. 97; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23; *Brown v. Maryland*, 12 Wheat. 419, 6 L.Ed. 678; *Craig v. Missouri*, 4 Pet. 410, 7 L.Ed. 903; *Tennessee v. Whitworth*, 117 U.S. 139, 6 S.Ct. 649, 29 L.Ed. 833; *Lake County v. Rollins*, 130 U.S. 662, 9 S.Ct. 651, 32 L.Ed. 1060; *Hodges v. United States*, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65; *Edwards v. Cuba R. Co.*, 268 U.S. 628, 45 S.Ct. 614, 69 L.Ed. 1124; *The Pocket Veto Case*, 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894; *Story on the Constitution* (5th Ed.) § 451; *Cooley's Constitutional Limitations* (2d Ed.) pp. 61, 70.

If the framers of the instrument had any thought that amendments differing in purpose should be ratified in different ways, nothing would have been simpler than so to phrase article 5 as to exclude implication or speculation. The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended.

This Court has repeatedly and consistently declared that the choice of mode rests solely in the discretion of Congress. *Dodge v. Woolsey*, 18 How. 331, 348, 15 L.Ed. 401; *Hawke v. Smith* (No. 1), 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871, 10 A.L.R. 1504; *Dillon v. Gloss*, 256 U.S. 368, 41 S.Ct. 510, 65 L.Ed. 994; *National Prohibition Cases*, 253 U.S. 350, 40 S.Ct. 486, 488, 64 L.Ed. 946. Appellees urge that what was said on the subject in the first three cases cited is dictum. And they argue that although in the last mentioned it was said the "Amendment, *by lawful proposal and ratification*, has become a part of the Constitution," the proposition they now present was not before the Court. While the language used in the earlier cases was not in the strict sense necessary to a decision, it is evident that article 5 was care-

fully examined and that the Court's statements with respect to the power of Congress in proposing the mode of ratification were not idly or lightly made. In the National Prohibition Cases, as shown by the briefs, the contentions now argued were made—the only difference between the presentation there and here being one of form rather than of substance.

The Tenth Amendment provides:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Appellees assert this language demonstrates that the people reserved to themselves powers over their own personal liberty, and that the legislatures are not competent to enlarge the powers of the federal government in that behalf. They deduce from this that the people never delegated to the Congress the unrestricted power of choosing the mode of ratification of a proposed amendment. But the argument is a complete non sequitur. The fifth article does not purport to delegate any governmental power to the United States, nor to withhold any from it. On the contrary, as pointed out in *Hawke v. Smith* (No. 1), *supra*, that article is a grant of authority by the people to Congress, and not to the United States. It was submitted as part of the original draft of the Constitution to the people in conventions assembled. They deliberately made the grant of power to Congress in respect to the choice of the mode of ratification of amendments. Unless and until that Article be changed by amendment, Congress must function as the delegated agent of the people in the choice of the method of ratification.

The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the states or to the people. It added nothing to the instrument as originally ratified and has no limited and special operation, as is contended, upon the people's delegation by article 5 of certain functions to the Congress.

The United States relies upon the fact that every amendment has been adopted by the method pursued in respect of the Eighteenth. Appellees reply that all these save the Eighteenth dealt solely with governmental means and machinery rather than with the rights of the individual citizen. But we think that several amendments touch rights of the citizens, notably the Thirteenth, Fourteenth, Fifteenth, Sixteenth and Nineteenth, U.S.C. A.Const. Amends. 13–16, 19, and in view of this, weight is to be given to the fact that these were adopted by the method now attacked. The Pocket Veto Case, *supra*.

For these reasons we reiterate what was said in the National Prohibition Cases, *supra*, that the "Amendment, by lawful proposal and ratification, has become a part of the Constitution."

The order of the court below is reversed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

#### NOTE

1. The term "legislature" as used in Const.U.S., Art. 5, refers to the formal legislative body of elected representatives, rather than the body in which the state has by its constitution vested its ultimate legislative power. Hence a state constitutional provision for referring the action of its legislature in ratifying a proposed amendment to the federal Constitution to a popular vote is invalid, *Hawke v. Smith*, 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871 (1920).

2. A state legislature or convention performs a federal function in passing on the ratification or rejection of a proposed amendment to the federal Constitution, *Hawke v. Smith*, *supra*; *Leser v. Garnett*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505 (1922). The Supreme Court has never directly determined how far states could limit the powers of ratifying conventions, or the delegates thereto. There are several state decisions arising out of state legislation providing for conventions to pass on the Twenty-First Amendment, which was the first instance in which Congress selected the convention method; see *In re Opinion of the Justices*, 226 Ala. 565, 148 So. 107 (1933); *In re Opinion of the Justices*, 132 Me. 491, 167 A. 176 (1933); *State ex rel. Donnelly v. Myers*, 127 Ohio St. 104, 186 N.E. 918 (1933); *State ex rel. Tate v. Sevier*, 333 Mo. 662, 62 S.W.2d 895 (1933). See also, L. B. Orfield, *The Procedure of the Federal Amending Power*, 25 Ill.L.Rev. 418 (1931); A. W. Weinfeld, *Power of Congress Over Ratifying Conventions*, 51 Harv.L.Rev. 473 (1938).

3. The powers of Congress with respect to amending the federal Constitution do not derive from the grant of legislative power to it by Const.U.S., Art. 1, and hence the resolution by which it proposes an amendment is not subject to veto by the President, *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L.Ed. 644 (1798).

4. A proposed amendment becomes a part of the Constitution immediately upon its ratification by the last state required to make up the requisite three-fourths, *Dillon v. Gloss*, 256 U.S. 368, 41 S. Ct. 510, 65 L.Ed. 994 (1921).

## COLEMAN v. MILLER.

Supreme Court of the United States, 1939.  
307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

In June, 1924, the Congress proposed an amendment to the Constitution, known as the Child Labor Amendment. In January, 1925, the Legislature of Kansas adopted a resolution rejecting the proposed amendment and a certified copy of the resolution was sent to the Secretary of State of the United States. In January, 1937, a resolution known as "Senate Concurrent Resolution No. 3" was introduced in the Senate of Kansas ratifying the proposed amendment. There were forty senators. When the resolution came up for consideration, twenty senators voted in favor of its adoption and twenty voted against it. The Lieutenant Governor, the presiding officer of the Senate, then cast his vote in favor of the resolution. The resolution was later adopted by the House of Representatives on the vote of a majority of its members.

This original proceeding in mandamus was then brought in the Supreme Court of Kansas by twenty-one members of the Senate, including the twenty senators who had voted against the resolution, and three members of the House of Representatives, to compel the Secretary of the Senate to erase an endorsement on the resolution to the effect that it had been adopted by the Senate and to endorse thereon the words "was not passed", and to restrain the officers of the Senate and House of Representatives from signing the resolution and the Secretary of State of Kansas from authenticating it and delivering it to the Governor. The petition challenged the right of the Lieutenant Governor to cast the deciding vote in the Senate. The petition also set forth the prior rejection of the proposed amendment and alleged that in the period from June, 1924, to March, 1927, the amendment had been rejected by both houses of the legislatures of twenty-six states, and had been ratified in only five states, and that by reason of that rejection and the failure of ratification within a reasonable time the proposed amendment had lost its vitality.

An alternative writ was issued. Later the Senate passed a resolution directing the Attorney General to enter the appearance of the State and to represent the State as its interests might appear. Answers were filed on behalf of the defendants other than the State and plaintiffs made their reply.

The Supreme Court found no dispute as to the facts. The court entertained the action and held that the Lieutenant Governor was authorized to cast the deciding vote, that the proposed

amendment retained its original vitality, and that the resolution "having duly passed the House of Representatives and the Senate, the act of ratification of the proposed amendment by the Legislature of Kansas was final and complete". The writ of mandamus was accordingly denied. 146 Kan. 390, 71 P.2d 518, 526. This Court granted certiorari. 303 U.S. 632, 58 S.Ct. 758, 82 L.Ed. 1092. \* \* \*

*Second.—The participation of the Lieutenant Governor.*—Petitioners contend that, in the light of the powers and duties of the Lieutenant Governor and his relation to the Senate under the state constitution, as construed by the supreme court of the state, the Lieutenant Governor was not a part of the "legislature" so that under Article V of the Federal Constitution, he could be permitted to have a deciding vote on the ratification of the proposed amendment, when the senate was equally divided.

Whether this contention presents a justiciable controversy, or a question which is political in its nature and hence not justiciable, is a question upon which the Court is equally divided and therefore the Court expresses no opinion upon that point.

*Third.—The effect of the previous rejection of the amendment and of the lapse of time since its submission.*

1. The state court adopted the view expressed by text-writers that a state legislature which has rejected an amendment proposed by the Congress may later ratify. The argument in support of that view is that Article V says nothing of rejection but speaks only of ratification and provides that a proposed amendment shall be valid as part of the Constitution when ratified by three-fourths of the States; that the power to ratify is thus conferred upon the State by the Constitution and, as a ratifying power, persists despite a previous rejection. The opposing view proceeds on an assumption that if ratification by "Conventions" were prescribed by the Congress, a convention could not reject and, having adjourned *sine die*, be reassembled and ratify. It is also premised, in accordance with views expressed by text-writers, that ratification if once given cannot afterwards be rescinded and the amendment rejected, and it is urged that the same effect in the exhaustion of the State's power to act should be ascribed to rejection; that a State can act "but once, either by convention or through its legislature".

Historic instances are cited. In 1865, the Thirteenth Amendment was rejected by the legislature of New Jersey which subsequently ratified it, but the question did not become important as ratification by the requisite number of States had already been proclaimed. The question did arise in connection with the adoption of the Fourteenth Amendment. The legislatures of Georgia,

North Carolina and South Carolina had rejected the amendment in November and December, 1866. New governments were erected in those States (and in others) under the direction of Congress. The new legislatures ratified the amendment, that of North Carolina on July 4, 1868, that of South Carolina on July 9, 1868, and that of Georgia on July 21, 1868. Ohio and New Jersey first ratified and then passed resolutions withdrawing their consent. As there were then thirty-seven States, twenty-eight were needed to constitute the requisite three-fourths. On July 9, 1868, the Congress adopted a resolution requesting the Secretary of State to communicate "a list of the States of the Union whose legislatures have ratified the fourteenth article of amendment", and in Secretary Seward's report attention was called to the action of Ohio and New Jersey. On July 20th Secretary Seward issued a proclamation reciting the ratification by twenty-eight States, including North Carolina, South Carolina, Ohio and New Jersey, and stating that it appeared that Ohio and New Jersey had since passed resolutions withdrawing their consent and that "it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid and therefore ineffectual". The Secretary certified that if the ratifying resolutions of Ohio and New Jersey were still in full force and effect, notwithstanding the attempted withdrawal, the amendment had become a part of the Constitution. On the following day the Congress adopted a concurrent resolution which, reciting that three-fourths of the States having ratified (the list including North Carolina, South Carolina, Ohio and New Jersey), declared the Fourteenth Amendment to be a part of the Constitution and that it should be duly promulgated as such by the Secretary of State. Accordingly, Secretary Seward, on July 28th, issued his proclamation embracing the States mentioned in the congressional resolution and adding Georgia.

Thus the political departments of the Government dealt with the effect both of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification. While there were special circumstances, because of the action of the Congress in relation to the governments of the rejecting States (North Carolina, South Carolina and Georgia), these circumstances were not recited in proclaiming ratification and the previous action taken in these States was set forth in the proclamation as actual previous rejections by the respective legislatures. This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted.

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in

the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

The precise question as now raised is whether, when the legislature of the State, as we have found, has actually ratified the proposed amendment, the Court should restrain the state officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments. We find no basis in either Constitution or statute for such judicial action. Article V, speaking solely of ratification, contains no provision as to rejection. Nor has the Congress enacted a statute relating to rejections. The statutory provision with respect to constitutional amendments is as follows:

"Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States".

The statute presupposes official notice to the Secretary of State when a state legislature has adopted a resolution of ratification. We see no warrant for judicial interference with the performance of that duty. See *Leser v. Garnett*, *supra*, 258 U.S. at page 137, 42 S.Ct. at page 217, 66 L.Ed. 505.

2. The more serious question is whether the proposal by the Congress of the amendment had lost its vitality through lapse of time and hence it could not be ratified by the Kansas legislature in 1937. The argument of petitioners stresses the fact that nearly thirteen years elapsed between the proposal in 1924 and the ratification in question. It is said that when the amendment was proposed there was a definitely adverse popular sentiment and that at the end of 1925 there had been rejection by both houses of the legislatures of sixteen States and ratification by only four States, and that it was not until about 1933 that an aggressive campaign was started in favor of the amendment. In reply, it is urged that Congress did not fix a limit of time for ratification and that an unreasonably long time had not elapsed since the submission; that the conditions which gave rise to the amendment had not been eliminated; that the prevalence of child labor, the diversity of state laws and the disparity in

their administration, with the resulting competitive inequalities, continued to exist. Reference is also made to the fact that a number of the States have treated the amendment as still pending and that in the proceedings of the national government there have been indications of the same view. It is said that there were fourteen ratifications in 1933, four in 1935, one in 1936, and three in 1937.

We have held that the Congress in proposing an amendment may fix a reasonable time for ratification. *Dillon v. Gloss*, 256 U.S. 368, 41 S.Ct. 510, 65 L.Ed. 994. There we sustained the action of the Congress in providing in the proposed Eighteenth Amendment that it should be inoperative unless ratified within seven years. No limitation of time for ratification is provided in the instant case either in the proposed amendment or in the resolution of submission. But petitioners contend that, in the absence of a limitation by the Congress, the Court can and should decide what is a reasonable period within which ratification may be had. We are unable to agree with that contention.

It is true that in *Dillon v. Gloss*, *supra*, the Court said that nothing was found in Article V which suggested that an amendment once proposed was to be open to ratification for all time, or that ratification in some States might be separated from that in others by many years and yet be effective; that there was a strong suggestion to the contrary in that proposal and ratification were but succeeding steps in a single endeavor; that as amendments were deemed to be prompted by necessity, they should be considered and disposed of presently; and that there is a fair implication that ratification must be sufficiently contemporaneous in the required number of States to reflect the will of the people in all sections at relatively the same period; and hence that ratification must be within some reasonable time after the proposal. These considerations were cogent reasons for the decision in *Dillon v. Gloss*, *supra*, that the Congress had the power to fix a reasonable time for ratification. But it does not follow that, whenever Congress has not exercised that power, the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications. That question was not involved in *Dillon v. Gloss*, *supra*, and, in accordance with familiar principle, what was there said must be read in the light of the point decided.

Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute. In their endeavor to answer this question petitioners' counsel have suggested that at least two years should be allowed; that six years would not seem to be unreasonably long; that seven years

year, six months and thirteen days was the average time used in passing upon amendments which have been ratified since the first ten amendments; that three years, six months and twenty-five days has been the longest time used in ratifying. To this list of variables, counsel add that "the nature and extent of publicity and the activity of the public and of the legislatures of the several States in relation to any particular proposal should be taken into consideration". That statement is pertinent, but there are additional matters to be examined and weighed. When a proposed amendment springs from a conception of economic needs, it would be necessary, in determining whether a reasonable time had elapsed since its submission, to consider the economic conditions prevailing in the country, whether these had so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it or whether conditions were such as to intensify the feeling of need and the appropriateness of the proposed remedial action. In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.

Our decision that the Congress has the power under Article V to fix a reasonable limit of time for ratification in proposing an amendment proceeds upon the assumption that the question, what is a reasonable time, lies within the congressional province. If it be deemed that such a question is an open one when the limit has not been fixed in advance, we think that it should also be regarded as an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment. The decision by the Congress, in its control of the action of the Secretary of State, of the question whether the amendment had been adopted within a reasonable time would not be subject to review by the courts.

It would unduly lengthen this opinion to attempt to review our decisions as to the class of questions deemed to be political and not justiciable. In determining whether a question falls within that category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations. There are many illustrations in the field of our conduct of foreign relations, where there are "considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a court of justice". *Ware v. Hylton*, 3 Dall. 199, 260, 1 L.Ed. 568. Questions involving similar considerations are found in the government of our internal affairs. Thus, under Article IV, section 4, of the Constitution, U.S.C.A. providing that the United States "shall guarantee to every State in this Union a Republican Form of Government", we have held that it rests with the Congress to decide what government is the established one in a State and whether or not it is republican in form. *Luther v. Borden*, 7 How. 1, 42, 12 L.Ed. 581. In that case Chief Justice Taney observed that "when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal". So, it was held in the same case that under the provision of the same Article for the protection of each of the States "against domestic violence" it rested with the Congress "to determine upon the means proper to be adopted to fulfill this guarantee". *Id.*, 7 How. at page 43, 12 L.Ed. 581. So, in *Pacific Telephone Company v. Oregon*, 223 U.S. 118, 32 S.Ct. 224, 231, 56 L.Ed. 377, we considered that questions arising under the guaranty of a republican form of government had long since been "definitely determined to be political and governmental" and hence that the question whether the government of Oregon had ceased to be republican in form because of a constitutional amendment by which the people reserved to themselves power to propose and enact laws independent of the legislative assembly and also to approve or reject any act of that body, was a question for the determination of the Congress. It would be finally settled when the Congress admitted the senators and representatives of the State.

For the reasons we have stated, which we think to be as compelling as those which underlay the cited decisions, we think that the Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of

ment had lost its vitality prior to the required ratifications. The state officials should not be restrained from certifying to the Secretary of State the adoption by the legislature of Kansas of the resolution of ratification.

As we find no reason for disturbing the decision of the Supreme Court of Kansas in denying the mandamus sought by petitioners, its judgment is affirmed but upon the grounds stated in this opinion.

Affirmed.

There was a concurring opinion by Mr. Justice BLACK, in which Mr. Justice ROBERTS, Mr. Justice FRANKFURTER and Mr. Justice DOUGLAS joined.

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### LESER v. GARNETT.

Supreme Court of the United States, 1922. 258 U.S. 130, 42 S.Ct. 217.  
66 L.Ed. 505.

[In Error to the Court of Appeals of Maryland. The object of the suit was to compel the respondents to strike the names of two women from the list of registered qualified voters in the City of Baltimore, on the ground that the Constitution of that State limits the suffrage to men, and that the Legislature of Maryland had refused to ratify the nineteenth amendment to the federal Constitution, U.S.C.A.Const. Amend. 19, and that, on several grounds, that amendment had not become a part of the federal Constitution. The trial court overruled these contentions and dismissed the petition, and its judgment was affirmed by the Court of Appeals, and plaintiffs bring error. Writ of error dismissed.]

Mr. Justice BRANDEIS. \* \* \* Whether the Nineteenth Amendment has become part of the federal Constitution is the question presented for decision. The first contention is that the power of amendment conferred by the federal Constitution and sought to be exercised does not extend to this amendment because of its character. The argument is that so great an addition to the electorate, if made without the state's consent, destroys its autonomy as a political body. This amendment is in character and phraseology precisely similar to the Fifteenth U.S. C.A.Const. Amend. 15. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the Fifteenth is valid, although rejected by six states, including Maryland, has been recognized and acted on for half a century.

See *United States v. Reese*, 92 U.S. 214, 23 L.Ed. 563; *Neale v. Delaware*, 103 U.S. 370, 26 L.Ed. 567; *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340, L.R.A.1916A, 1124; *Myers v. Anderson*, 238 U.S. 368, 35 S.Ct. 932, 59 L.Ed. 1349. The suggestion that the Fifteenth was incorporated in the Constitution, not in accordance with law, but practically as a war measure which has been validated by acquiescence, cannot be entertained.

The second contention is that in the Constitutions of several of the 36 states named in the proclamation of the Secretary of State there are provisions which render inoperative the alleged ratifications by their Legislatures. The argument is that by reason of these specific provisions the Legislatures were without power to ratify. But the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state. *Hawke v. Smith*, No. 1, 253 U.S. 221, 40 S.Ct. 495, 64 L. Ed. 871, 10 A.L.R. 1504; *Hawke v. Smith*, No. 2, 253 U.S. 231, 40 S.Ct. 498, 64 L.Ed. 877; *National Prohibition Cases*, 253 U.S. 350, 386, 40 S.Ct. 486, 588, 64 L.Ed. 946.

The remaining contention is that the ratifying resolutions of Tennessee and of West Virginia are inoperative, because adopted in violation of the rules of legislative procedure prevailing in the respective states. The question raised may have been rendered immaterial by the fact that since the proclamation the Legislatures of two other states—Connecticut and Vermont—have adopted resolutions of ratification. But a broader answer should be given to the contention. The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed amendment was ratified by the Legislatures of 36 states, and that it “has become valid to all intents and purposes as a part of the Constitution of the United States.” As the Legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts. The rule declared in *Field v. Clark*, 143 U.S. 649, 669–673, 12 S.Ct. 495, 36 L.Ed. 294, is applicable here. See, also, *Harwood v. Wentworth*, 162 U.S. 547, 562, 16 S.Ct. 890, 40 L.Ed. 1069. \* \* \*

## NOTE

1. For discussion of the problem of the reported case, see W. L. Marbury, *Is the Fifteenth Amendment Void*, 23 Harv.L.Rev. 169 (1909); W. L. Marbury, *Limitations Upon the Amending Power*, 33 Harv.L.Rev. 223 (1919); W. L. Frierson, *Amending the Constitution of the United States; A Reply to Mr. Marbury*, 33 Harv.L. Rev. 659 (1920); D. O. McGovney, *Is the Eighteenth Amendment Void Because of its Contents*, 20 Col.L.Rev. 499 (1920); L. B. Orfield, *The Scope of the Federal Amending Power*, 28 Mich.L.Rev. 550 (1930).

2. On the general subject of amending the federal Constitution, see also L. B. Orfield, *The Federal Amending Power: Genesis and Justiciability*, 14 Minn.L.Rev. 369 (1930).

## CHAPTER 12

### THE FEDERAL EXECUTIVE<sup>1</sup>

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#### STATE of MISSISSIPPI v. JOHNSON.

Supreme Court of the United States, 1867. 4 Wall. 475, 18 L.Ed. 437.

See Chapter 3, page 73.

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#### BIDDLE v. PEROVICH.

Supreme Court of the United States, 1927. 274 U.S. 480, 47 S.Ct. 664,  
71 L.Ed. 1161, 52 A.L.R. 832.

Mr. Justice HOLMES delivered the opinion of the Court.

The Circuit Court of Appeals for the Eighth Circuit has certified questions of law to this Court upon facts of which we give an abridged statement. Perovich was convicted in Alaska of murder; the verdict being that he was "guilty of murder in the first degree and that he suffer death." On September 15, 1905, he was sentenced to be hanged and the judgment was affirmed by this Court. *Perovich v. United States*, 205 U.S. 86, 27 S.Ct. 456, 51 L.Ed. 722. Respites were granted from time to time, and on June 5, 1909, President Taft executed a document by which he purported to "commute the sentence of the said Vuco Perovich \* \* \* to imprisonment for life in a penitentiary to be designated by the Attorney General of the United States." Thereupon Perovich was transferred from jail in Alaska to a penitentiary in Washington and some years later to one in Leavenworth, Kansas. In November, 1918, Perovich, reciting that his sentence had been commuted to life imprisonment, applied for a pardon—and did the same thing again on December 10, 1921. On February 20, 1925, he filed in the District Court for the District of Kansas an application for a writ of habeas corpus on the ground that his removal from jail to a penitentiary and the order of the President were without his consent and without legal authority. The District Judge adopted this view and thereupon ordered the prisoner to be set at large. 9 F.2d 124. We pass over the difficulties in the way of this con-

clusion and confine ourselves to the questions proposed. The first is:

"Did the President have authority to commute the sentence of Perovich from death to life imprisonment?"

Both sides agree that the act of the President was properly styled a commutation of sentence, but the counsel of Perovich urge that when the attempt is to commute a punishment to one of a different sort it cannot be done without the convict's consent. The Solicitor General presented a very persuasive argument that in no case is such consent necessary to an unconditional pardon and that it never had been adjudged necessary before. *Burdick v. United States*, 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476. He argued that the earlier cases here and in England turned on the necessity that the pardon should be pleaded, but that when it was brought to the judicial knowledge of the Court "and yet the felon pleads not guilty and waives the pardon, he shall not be hanged." *Jenkins*, 129, Third Century, case 62.

We will not go into history, but we will say a word about the principles of pardons in the law of the United States. A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. See *Ex parte Grossman*, 267 U.S. 87, 120, 121, 45 S.Ct. 332, 69 L.Ed. 527, 38 A.L.R. 131. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what shall be done. So far as a pardon legitimately cuts down a penalty it affects the judgment imposing it. No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and to be enforced, and that the convict's consent is not required.

When we come to the commutation of death to imprisonment for life it is hard to see how consent has any more to do with it than it has in the cases first put. Supposing that Perovich did not accept the change, he could not have got himself hanged against the Executive order. Supposing that he did accept, he could not affect the judgment to be carried out. The considerations that led to the modification had nothing to do with his will. The only question is whether the substituted punishment was authorized by law—here, whether the change is within the

scope of the words of the Constitution, article 2, § 2, U.S.C.A. Const. art. 2, § 2:

"The President \* \* \* shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."

We cannot doubt that the power extends to this case. By common understanding imprisonment for life is a less penalty than death. It is treated so in the statute under which Perovich was tried, which provides that "the jury may qualify their verdict [guilty of murder] by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life." Criminal Code of Alaska, Act of March 3, 1899, c. 429, § 4; 30 Stat. 1253. See *Ex parte Wells*, 18 How. 307, 15 L.Ed. 421; *Ex parte Grossman*, 267 U.S. 87, 109, 45 S.Ct. 332, 69 L.Ed. 527, 38 A.L.R. 131. The opposite answer would permit the President to decide that justice requires the diminution of a term or a fine without consulting the convict, but would deprive him of the power in the most important cases and require him to permit an execution which he had decided ought not to take place unless the change is agreed to by one who on no sound principle ought to have any voice in what the law should do for the welfare of the whole. We are of opinion that the reasoning of *Burdick v. United States*, 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476, is not to be extended to the present case. The other questions certified become immaterial as we answer the first question: Yes.

The CHIEF JUSTICE took no part in this case.

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Ex parte GROSSMAN.

Supreme Court of the United States, 1925. 267 U.S. 87, 45 S.Ct. 332, 69 L.Ed. 527, 38 A.L.R. 131.

See Chapter 3, page 76.

## NOTE

1. Congress has no power to control the exercise of the President's pardon power, nor to limit the effect of a pardon, *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366 (1867). General amnesty acts are not deemed attempts to usurp the pardon power, *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896).

2. A person tendered a pardon may refuse to accept it and thereby render it ineffective, *Burdick v. U. S.*, 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476 (1915).

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## RATHBUN v. UNITED STATES.

Supreme Court of the United States, 1935. 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611.

Mr. Justice SUTHERLAND delivered the opinion of the Court. Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President undertook to remove him from office, to the time of his death on February 14, 1934. The court below has certified to this court two questions (Act of February 13, 1925, § 3(a), c. 229, 43 Stat. 936, 939, 28 U.S.C. § 288, 28 U.S.C.A. § 288), in respect of the power of the President to make the removal. The material facts which give rise to the questions are as follows:

William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years, expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection," but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult his friends. After some further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming, and saying: "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think

it is best for the people of this country that I should have a full confidence."

The commissioner declined to resign; and on October 7, 1933, the President wrote him: "Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission."

Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of \$10,000 per annum. Upon these and other facts set forth in the certificate, which we deem it unnecessary to recite, the following questions are certified:

"1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office', restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

"If the foregoing question is answered in the affirmative, then—

"2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?"

The Federal Trade Commission Act, c. 311, 38 Stat. 717, 718, §§ 1, 2, 15 U.S.C. §§ 41, 42, 15 U.S.C.A. §§ 41, 42, creates a commission of five members to be appointed by the President by and with the advice and consent of the Senate, and section 1 provides: "Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act [September 26, 1914], the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. \* \* \*"

\* \* \*

First. The question first to be considered is whether, by the provisions of section 1 of the Federal Trade Commission Act already quoted, the President's power is limited to removal for the specific causes enumerated therein. \* \* \*

We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here; and we pass to the second question.

Second. To support its contention that the removal provision of section 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. These opinions examine at length the historical, legislative, and judicial data bearing upon the question, beginning with what is called "the decision of 1789" in the first Congress and coming down almost to the day when the opinions were delivered. They occupy 243 pages of the volume in which they are printed. Nevertheless, the narrow point actually decided was only that the president had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of *stare decisis*. In so far as they are out of harmony with the views here set forth, these expressions are disapproved. A like situation was presented in the case of *Cohens v. Virginia*, 6 Wheat. 264, 399, 5 L.Ed. 257, in respect of certain general expressions in the opinion in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60. Chief Justice Marshall, who delivered the opinion in the *Marbury Case*, speaking again for the court in the *Cohens Case*, said: "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

And he added that these general expressions in the case of *Marbury v. Madison* were to be understood with the limitations put upon them by the opinion in the *Cohens Case*. See, also, *Carroll v. Lessee of Carroll et al.*, 16 How. 275, 286-287, 14 L.Ed. 936; *O'Donoghue v. United States*, 289 U.S. 516, 550, 53 S.Ct. 740, 77 L.Ed. 1356.

The office of a postmaster is so essentially unlike the office now involved that the decision in the Myers Case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the Myers Case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition," that is to say, in filling in and administering the details embodied by that general standard, the commission acts in part quasi legislatively and in part quasi judicially. In making investigations and reports thereon for the information of Congress under section 6, 15 U.S.C.A. § 46, in aid of the legislative power, it acts as a legislative agency. Under section 7, 15 U.S.C.A. § 47, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government.

If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the re-

movability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these quasi legislative and quasi judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power (*Williams v. United States*, 289 U.S. 553, 565-567, 53 S.Ct. 751, 77 L.Ed. 1372), continue in office only at the pleasure of the President.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, *The Works of James Wilson* (1896), vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution (4th Ed.) § 530, citing No. 48 of the *Federalist*, said that neither of the departments in reference to each other "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." And see *O'Donoghue v. United States*, supra, 289 U.S. 516, at pages 530, 531, 53 S.Ct. 740, 77 L.Ed. 1356.

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already ful-

It appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

In the light of the question now under consideration, we have re-examined the precedents referred to in the Myers Case, and find nothing in them to justify a conclusion contrary to that which we have reached. The so-called "decision of 1789" had relation to a bill proposed by Mr. Madison to establish an executive Department of Foreign Affairs. The bill provided that the principal officer was "to be removable from office by the President of the United States." This clause was changed to read "whenever the principal officer shall be removed from office by the President of the United States," certain things should follow, thereby, in connection with the debates, recognizing and confirming, as the court thought in the Myers Case, the sole power of the President in the matter. We shall not discuss the subject further, since it is so fully covered by the opinions in the Myers Case, except to say that the office under consideration by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers. And it is pertinent to observe that when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply. 1 Annals of Congress, cols. 611-612.

In *Marbury v. Madison*, *supra*, 1 Cranch 137, at pages 162, 165, 166, 2 L.Ed. 60, it is made clear that Chief Justice Marshall was of opinion that a justice of the peace for the District of Columbia was not removable at the will of the President; and that there was a distinction between such an officer and officers appointed to aid the President in the performance of his constitutional duties. In the latter case, the distinction he saw was that "their acts are his acts" and his will, therefore, controls; and, by way of illustration, he adverted to the act establishing the Department of Foreign Affairs, which was the subject of the "decision of 1789."

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the Myers decision, affirming the

power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

To the extent that, between the decision in the Myers Case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

In accordance with the foregoing, the questions submitted are answered:

Question No. 1, Yes.

Question No. 2, Yes.

Mr. Justice McREYNOLDS agrees that both questions should be answered in the affirmative. A separate opinion in *Myers v. United States*, 272 U.S. 52, at page 178, 47 S.Ct. 21, at page 46, 71 L.Ed. 160, states his views concerning the power of the President to remove appointees.

#### NOTE

1. An extended review of the President's power to remove an officer of the United States from office is found in *Myers v. U. S.*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926). See also W. J. Donovan and R. R. Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 Cornell L.Quar. 215 (1936); E. S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Col.L.Rev. 353 (1927).

2. As to the validity of civil service legislation, see *Butler v. White*, 83 F. 578 (C.C.W.Va.1897).

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#### WRIGHT v. UNITED STATES.

Supreme Court of the United States, 1938. 302 U.S. 583, 58 S.Ct. 395,  
82 L.Ed. 439.

See Chapter 6, page 187.

ROTTSCHAEFER MCB CONST.LAW—30

## CHAPTER 13

### FEDERAL JUDICIAL POWERS

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#### Ex parte BAKELITE CORPORATION.

Supreme Court of the United States, 1929. 279 U.S. 438, 49 S.Ct. 411,  
73 L.Ed. 789.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a petition for a writ of prohibition to the Court of Customs Appeals prohibiting it from entertaining an appeal from findings of the Tariff Commission in a proceeding begun and conducted under section 316 of the Tariff Act of 1922, c. 356, 42 Stat. 858, 943; sections 174-180, title 19, U.S.C., 19 U.S.C.A. §§ 174-180. A rule to show cause was issued; return was made to the rule; and a hearing has been had on the petition and return. \* \* \*

The grounds on which the jurisdiction of the Court of Customs Appeals was challenged in that court, and on which a writ of prohibition is sought here, are:

(1) That the Court of Customs Appeals is an inferior court created by Congress under section 1 of article 3 of the Constitution, U.S.C.A.Const. art. 3, § 1, and as such it can have no jurisdiction of any proceeding which is not a case or controversy within the meaning of section 2 of the same article, U.S.C.A. Const. art. 3, § 2.

(2) That the proceeding presented by the appeal from the Tariff Commission is not a case or controversy in the sense of that section, but is merely an advisory proceeding in aid of executive action.

The Court of Customs Appeals considered these grounds in the order just stated, and by its ruling sustained the first and rejected the second. 16 Ct.Cust.App. 378, 53 Treasury Decisions, 716.

In this Court counsel have addressed arguments, not only to the two questions bearing on the jurisdiction of the Court of Customs Appeals, but also to the question whether, if that court be exceeding its jurisdiction, this Court has power to issue to it a writ of prohibition to arrest the unauthorized proceedings.

The power of this Court to issue writs of prohibition never has been clearly defined by statute or by decisions. And the

existence of the power in a situation like the present is not free from doubt. But the doubt need not be resolved now, for, assuming that the power exists, there is here, as will appear later on, no tenable basis for exercising it. In such a case it is admissible, and is common practice, to pass the question of power and to deny the writ because without warrant in other respects.

While article 3 of the Constitution declares, in section 1, that the judicial power of the United States shall be vested in one Supreme Court and in "such inferior courts as the Congress may from time to time ordain and establish," and prescribes, in section 2, that this power shall extend to cases and controversies of certain enumerated classes, it long has been settled that article 3 does not express the full authority of Congress to create courts, and that other articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in section 2 of article 3 are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exercise of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers, and are prescribed by Congress independently of section 2 of article 3; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.

The first pronouncement on the subject by this Court was in *American Insurance Co. v. Canter*, 1 Pet. 511, 7 L.Ed. 242, where the status and jurisdiction of courts created by Congress for the Territory of Florida were drawn in question. Chief Justice Marshall, speaking for the court, said (page 546):

"These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress,

in the execution of those general powers which that body possesses over the territories of the United States."

That ruling has been accepted and applied from that time to the present in cases relating to territorial courts.

A like view has been taken of the status and jurisdiction of the courts provided by Congress for the District of Columbia. These courts, this Court has held, are created in virtue of the power of Congress "to exercise exclusive legislation" over the district made the seat of the government of the United States, are legislative rather than constitutional courts, and may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of article 3, but are merely in aid of legislative or executive action, and therefore outside the admissible jurisdiction of courts established under that article.

The United States Court for China and the consular courts are legislative courts created as a means of carrying into effect powers conferred by the Constitution respecting treaties and commerce with foreign countries. They exercise their functions within particular districts in foreign territory, and are invested with a large measure of jurisdiction over American citizens in those districts. The authority of Congress to create them and to clothe them with such jurisdiction has been upheld by this Court and is well recognized.

Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands, or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.

The Court of Claims is such a court. It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function

which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies. \* \* \* Before we turn to the status of the Court of Customs Appeals it will be helpful to refer briefly to the Customs Court. Formerly it was the Board of General Appraisers. Congress assumed to make the board a court by changing its name. There was no change in powers, duties, or personnel. The board was an executive agency charged with the duty of reviewing acts of appraisers and collectors in appraising and classifying imports and in liquidating and collecting customs duties. But its functions, although mostly quasi judicial, were all susceptible of performance by executive officers, and had been performed by such officers in earlier times.

The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called the Board of General Appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact, their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings.

This summary of the court's province as a special tribunal, of the matters subjected to its revisory authority, and of its relation to the executive administration of the customs laws, shows very plainly that it is a legislative and not a constitutional court.

Some features of the act creating it are referred to in the opinion below as requiring a different conclusion; but, when rightly understood, they cannot be so regarded.

A feature much stressed is the absence of any provision respecting the tenure of the judges. From this it is argued that

Congress intended the court to be a constitutional one, the judges of which would hold their offices during good behavior. And in support of the argument, it is said that in creating courts Congress has made it a practice to distinguish between those intended to be constitutional and those intended to be legislative by making no provision respecting the tenure of judges of the former and expressly fixing the tenure of judges of the latter. But the argument is fallacious. It mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred. Nor has there been any settled practice on the part of Congress which gives special significance to the absence or presence of a provision respecting the tenure of judges. This may be illustrated by two citations. The same Congress that created the Court of Customs Appeals made provision for five additional circuit judges, and declared that they should hold their offices during good behavior; and yet the status of the judges was the same as it would have been had that declaration been omitted. In creating courts for some of the territories, Congress failed to include a provision fixing the tenure of the judges; but the courts became legislative courts just as if such a provision had been included.

Another feature much stressed is a provision purporting to authorize temporary assignments of circuit and district judges to the Court of Customs Appeals when vacancies occur in its membership or when any of its members are disqualified or otherwise unable to act. This, it is said, shows that Congress intended the court to be a constitutional one, for otherwise such assignments would be inadmissible under the Constitution. But, if there be constitutional obstacles to assigning judges of constitutional courts to legislative courts, the provision cited is for that reason invalid, and cannot be saved on the theory that Congress intended the court to be in one class when under the Constitution it belongs in another. Besides, the inference sought to be drawn from that provision is effectually refuted by two later enactments—one permitting judges of that court to be assigned from time to time to the superior courts of the District of Columbia, which are legislative courts, and the other transferring to that court the advisory jurisdiction in respect of appeals from the Patent Office which formerly was vested in the Court of Appeals of the District of Columbia.

Another feature to which attention was given is the denomination of the court as a United States court. That the court is a

court of the United States is plain; but this is quite consistent with its being a legislative court.

As it is plain that the Court of Customs Appeals is a legislative and not a constitutional court, there is no need for now inquiring whether the proceeding under section 316 of the Tariff Act of 1922, now pending before it, is a case or controversy within the meaning of section 2 of article 3 of the Constitution, for this section applies only to constitutional courts. Even if the proceeding is not such a case or controversy, the Court of Customs Appeals, being a legislative court, may be invested with jurisdiction of it, as is done by section 316.

Of course, a writ of prohibition does not lie to a court which is proceeding within the limits of its jurisdiction, as the Court of Customs Appeals appears to be doing in this instance.

Prohibition denied.

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### COHENS v. VIRGINIA.

Supreme Court of the United States, 1821. 6 Wheat. 264, 5 L.Ed. 257.

Mr. Chief Justice MARSHALL \* \* \*

The second section of the third article of the Constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. \* \* \* This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

In the second class, the jurisdiction depends entirely on the character of the parties. \* \* \* If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.

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### ST. LOUIS & S. F. RY. CO. v. JAMES.

Supreme Court of the United States, 1896. 161 U.S. 545, 16 S.Ct. 621, 40 L.Ed. 802.

Mr. Justice SHIRAS, after stating the facts, delivered the opinion of the court.

Etta James, as a citizen of the state of Missouri, and having a cause of action against the St. Louis & San Francisco Railway

Company, a corporation of the state of Missouri, could, of course, sue the latter in the courts of that state, but equally, of course, could not sue such state corporation in the circuit court of the United States for the district of Missouri. Can she, as such citizen of the state of Missouri, lawfully assert her cause of action in the circuit court of the United States for the district of Arkansas against the St. Louis & San Francisco Railway Company, by showing that the latter had availed itself of the rights and privileges conferred by the state of Arkansas on railroad corporations of other states coming within her borders, and complying with the terms and conditions of her statutes?

Before addressing ourselves directly to this question, it must be conceded that the plaintiff's cause of action, though arising in Missouri, is transitory in its nature, and that the St. Louis & San Francisco Railway Company, though denying the plaintiff's right to sue it in the circuit court of Arkansas, waives its statutory privilege of being sued only in the district in which it has its habitat.

It must be regarded, to begin with, as finally settled, by repeated decisions of this court, that, for the purpose of jurisdiction in the federal courts, a state corporation is deemed to be indisputably composed of citizens of such state. It is equally true that, without objection so far from the federal authority, whether legislative or judicial, it has become customary for a state adjacent to the state creating a railroad corporation to legislatively grant authority to such foreign corporation to enter its territory with its road,—to make running arrangements with its own railroads, to buy or lease them, or to consolidate with the companies owning them. Sometimes, as in the present case, such foreign corporation is declared, upon its acceptance of prescribed terms and conditions, to become a domestic corporation of such adjacent state, and to be endowed with all the rights and privileges enjoyed by similar corporations created by such state.

We have already said that the rule that state corporations are indisputably composed of citizens of the states creating them is finally settled. But, in view of the question now before us, it may be well to briefly review some of the cases.

In the case of *Bank of United States v. Deveaux*, 5 Cranch 61, 3 L.Ed. 38, where an action had been brought against citizens of the state of Georgia in the circuit court of the United States for the district of Georgia, by a petition of "the president, directors, and company of the Bank of the United States," wherein it was alleged that the petitioners were citizens of the state of Pennsylvania, it was held that a corporation aggregate, composed of citizens of one state, may sue a citizen of another state

in the circuit court of the United States; and Chief Justice Marshall, in giving the opinion of the court, said: "Substantially and essentially, the parties in such a case, where the members of the corporation are aliens or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals."

Before leaving this case, it should be noted that the United States Bank was not a corporation of the state of Pennsylvania, but of the United States. The decision, therefore, was to the effect that where it appeared that a corporation plaintiff, regardless of its origin, was composed of aliens or of citizens of a different state from the defendant, the plaintiff, though suing in its corporate name, could make the averment that the individuals who composed the corporation were such aliens or citizens of a different state, and such averment, if not traversed, would sustain the jurisdiction. The principal of the case makes the individual corporators the real parties to the suit.

In *Louisville, C. & C. Railroad Co. v. Letson*, 2 How. 497, 11 L.Ed. 353, an action was brought, in the circuit court of the United States for the district of South Carolina, by a citizen of the state of New York, against a corporation whose members were alleged to be citizens of South Carolina. A plea to the jurisdiction was set up that there were members of the defendant company who were not citizens of the state of South Carolina, but of another state than New York or South Carolina. In the opinion in this case, *Bank of United States v. Deveaux* was said to have gone too far, and that consequences and inferences had been argumentatively drawn from it which ought not to be followed; and it was said that "a corporation created by a state to perform its functions under the authority of that state, and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state"; and accordingly the judgment of the circuit court, overruling the plea to its jurisdiction, was sustained.

*Marshall v. Railroad Co.*, 16 How. 314, 14 L.Ed. 953, was a case tried in the circuit court of the United States for the district of Maryland, wherein the plaintiff alleged that he was a citizen of the state of Virginia, and that the *Baltimore & Ohio Railroad Company*, the defendant, was a body corporate by an act of the general assembly of Maryland; and it was suggested, when the case came into this court, that such an averment was insufficient to show jurisdiction in the courts of the United States over the suits, and it was denied that the decision in *Louisville*,

*C. & C. Railroad Co. v. Letson*, 2 How. 497, 11 L.Ed. 353, sanctioned it, or, if some of the doctrines there advanced seemed to do so, it was said that they were extrajudicial, and therefore not authoritative. Several judges dissented, but the court, speaking through Mr. Justice Grier, held that, "if the declaration set forth facts from which the citizenship of the parties may be presumed or legally inferred, it is sufficient. The presumption arising from the habitat of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that 'the defendants are a body corporate, by the act of the general assembly of Maryland,' is a sufficient averment that the real defendants are citizens of that state."

In *Covington Draw Bridge Co. v. Shepherd*, 20 How. 227, 233, 15 L.Ed. 896, Chief Justice Taney, speaking for the court, said: "The question as to the jurisdiction of the courts of the United States in cases where a corporation is a party was argued and considered in this court, for the first time, in the cases of *Hope Insurance Co. v. Boardman*, 5 Cranch 57, 3 L.Ed. 36 and of *Bank of United States v. Deveaux*, 5 Cranch 61, 3 L.Ed. 38. These two cases were argued at the same term, and were, as appears by the report, decided at the same time. And in the last-mentioned case the court held that in a suit by or against a corporation, in its corporate name, this court might look beyond the mere legal being which the charter created, and regard it as a suit brought by or against the individual persons who composed the corporation; and an averment that they were citizens of a particular state (if such was the fact) would be sufficient to give jurisdiction to a court of the United States, although the suit was in the corporate name, and the individual corporators were not named in the suit or the averment.

"But in the case of *Louisville, C. & C. Railroad Co. v. Letson*, the court overruled as much of this opinion as authorized a corporation to plead in abatement that one or more of the corporators, plaintiff or defendants, were citizens of a different state from the one described, and held that the members of the corporate body must be presumed to be citizens of the state in which the corporation was domiciled, and that both parties were estopped from denying it; and that inasmuch as the corporators were not parties to the suit in their individual characters, but merely as members and component parts of the body or legal entity which the charter created, the members who composed it ought to be presumed, so far as its contracts and liabilities are concerned, to reside where the domicile of the body was fixed by law, and where alone they could act as one person; and to the same extent, and for the same purposes, be also re-

garded as citizens of the state from which this legal being derived its existence and its faculties and powers."

The previous cases were reviewed in *Ohio & M. Railroad Co. v. Wheeler*, 1 Black 286, 17 L.Ed. 130. That was the case of an action brought in the circuit court of the United States for the district of Indiana against Wheeler, a citizen of that state, to recover the amount due on his subscription to stock of the Ohio & Mississippi Railroad Company. The declaration described the plaintiffs as "the president and directors of the Ohio and Mississippi Railroad Company, a corporation created by the laws of the states of Indiana and Ohio, and having its principal place of business in Cincinnati, in the state of Ohio, a citizen of the state of Ohio." The defendant pleaded to the jurisdiction by alleging that the plaintiff company, although a corporation of the state of Ohio in the first instance, had been incorporated by an act of assembly of the state of Indiana, and thus had become a body corporate of the same state whereof he was a citizen.

The question thus raised was, on a certificate of a division of opinion between the judges of the circuit court, brought to this court, and was answered as follows: "This suit in the corporate name is, in contemplation of law, the suit of the individual persons who compose it, and must therefore be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of the last-mentioned state. Such an action cannot be maintained in a court of the United States, where jurisdiction of the case depends altogether on the citizenship of the parties. And in such a suit it can make no difference whether the plaintiffs sue in their own proper names, or by the corporate name and style by which they are described. The averments in the declaration would seem to imply that the plaintiffs claim to have been created a corporate body, and to have been endued with the capacities and faculties it possesses by the co-operating legislation of the two states, and to be one and the same legal being in both states. If this were the case, it would not affect the question of jurisdiction in this case. But such a corporation can have no legal existence upon the principles of the common law or under the decision of this court in the case of *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L.Ed. 274. It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the states of Ohio and Indiana, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of those states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state, except by the law of the state. And neither state could confer on it a corporate existence

in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person which exists by force of law can have no existence beyond the limits of the state or sovereignty which brings it into life, and endues it with its faculties and powers. The president and directors of the Ohio & Mississippi Railroad Company are therefore a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a circuit court of the United States. \* \* \* And we shall certify to the circuit court that it has no jurisdiction of the case on the facts presented by the pleadings." \* \* \*

We are now asked to extend the doctrine of indisputable citizenship so that, if a corporation of one state, indisputably taken, for the purpose of federal jurisdiction, to be composed of citizens of such state, is authorized by the law of another state to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second state, in such a sense as to confer jurisdiction on the federal courts at the suit of a citizen of the state of its original creation.

We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that state corporations were composed of citizens of the state which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it. \* \* \*

The result of these views is that we answer the second question put to us by the circuit court of appeals in the negative, and to render it unnecessary to answer the other questions.

[Mr. Justice HARLAN dissented.]

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MARTIN v. HUNTER'S LESSEE, 1816, 1 Wheat. 304, 337, 338, 349, 350, 4 L.Ed. 97, Mr. Justice STORY [upholding a writ of error from the federal Supreme Court to the Virginia Court of Appeals in a civil case]:

"Appellate jurisdiction is given by the Constitution to the Supreme Court in all cases where it has not original jurisdiction,

subject, however, to such exceptions and regulations as Congress may prescribe. It is, therefore, capable of embracing every case enumerated in the Constitution, which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the Constitution in the most general terms, and may, therefore, be exercised by Congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the Constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

"As, then, by the terms of the Constitution, the appellate jurisdiction is not limited as to the Supreme Court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, 'the judicial power (which includes appellate power) shall extend to all cases,' etc., and 'in all other cases before mentioned the Supreme Court shall have appellate jurisdiction.' It is the case, then, and not the court, that gives the jurisdiction. \* \* \*

"We are referred to the power which it is admitted Congress possess to remove suits from state courts to the national courts.

\* \* \* This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language, an exercise of original jurisdiction; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as Congress is not limited by the Constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, and

enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied, by the legislature, to interlocutory as well as final judgments. And if the right of removal from state courts exists before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the Constitution does not include cases pending in state courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of state tribunals."

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### MONACO v. MISSISSIPPI.

Supreme Court of the United States, 1934. 292 U.S. 313, 54 S.Ct. 745,  
78 L.Ed. 1282.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

The Principality of Monaco asks leave to bring suit in this Court against the State of Mississippi upon bonds issued by the State and alleged to be the absolute property of the Principality.

\* \* \*

The Principality relies upon the provisions of section 2 of article 3 of the Constitution of the United States, U.S.C.A.Const. art. 3, § 2, that the judicial power shall extend to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects" (clause 1), and that in cases "in which a State shall be Party" this Court shall have original jurisdiction (clause 2). The absence of qualification requiring the consent of the State in the case of a suit by a foreign State is asserted to be controlling. And the point is stressed that the Eleventh Amendment of the Constitution, U.S.C.A.Const. Amend. 11, providing that the judicial power shall not be construed to extend to any suit against one of the United States "by Citizens of another State, or by Citizens or subjects of any Foreign State," contains no reference to a suit brought by a foreign State.

The argument drawn from the lack of an express requirement of consent to be sued is inconclusive. Thus there is no express provision that the United States may not be sued in the absence of consent. Clause 1 of section 2 of article 3 extends the judicial power "to Controversies to which the United States

shall be a Party." Literally, this includes such controversies, whether the United States be party plaintiff or defendant. *Williams v. United States*, 289 U.S. 553, 573, 53 S.Ct. 751, 77 L.Ed. 1372. But by reason of the established doctrine of the immunity of the sovereign from suit except upon consent, the provision of clause 1 of section 2 of article 3 does not authorize the maintenance of suits against the United States. *Williams v. United States*, *supra*. Compare *Cohens v. Virginia*, 6 Wheat. 264, 411, 412, 5 L.Ed. 257; *Minnesota v. Hitchcock*, 185 U.S. 373, 384, 386, 22 S.Ct. 650, 46 L.Ed. 954; *Kansas v. United States*, 204 U.S. 331, 341, 342, 27 S.Ct. 388, 51 L.Ed. 510. And while clause 2 of section 2 of article 3 gives this Court original jurisdiction in those cases in which "a State shall be Party," this Court has no jurisdiction of a suit by a State against the United States in the absence of consent. *Kansas v. United States*, *supra*. Clause 2 merely distributes the jurisdiction conferred by clause 1, and deals with cases in which resort may be had to the original jurisdiction of this Court in the exercise of the judicial power as previously given. *Duhne v. New Jersey*, 251 U.S. 311, 314, 40 S.Ct. 154, 64 L.Ed. 280.

Similarly, neither the literal sweep of the words of clause 1 of section 2 of article 3, nor the absence of restriction in the letter of the Eleventh Amendment, permits the conclusion that in all controversies of the sort described in clause 1, and omitted from the words of the Eleventh Amendment, a State may be sued without her consent. Thus clause 1 specifically provides that the judicial power shall extend "to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." But, although a case may arise under the Constitution and laws of the United States, the judicial power does not extend to it if the suit is sought to be prosecuted against a State, without her consent, by one of her own citizens. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842; *Duhne v. New Jersey*, *supra*, page 311 of 251 U.S., 40 S.Ct. 154, 64 L.Ed. 280. The requirement of consent is necessarily implied. The State has the same immunity in case of a suit brought by a corporation created by act of Congress. *Smith v. Reeves*, 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed. 1140. Yet in neither case is the suit within the express prohibition of the Eleventh Amendment. Again, the Eleventh Amendment mentions only suits "in law or equity"; it does not refer to suits in admiralty. But this Court has held that the Amendment does not "leave open a suit against a state in the admiralty jurisdiction by individuals, whether its own citizens or not." *Ex parte State of New York*, No. 1, 256 U.S. 490, 498, 41 S.Ct. 588, 590, 65 L.Ed. 1057.

Manifestly, we cannot rest with a mere literal application of the words of section 2 of article 3, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention." The Federalist, No. 81. The question is whether the plan of the Constitution involves the surrender of immunity when the suit is brought against a State, without her consent, by a foreign State. \* \* \*

It is true that, despite these cogent statements of the views which prevailed when the Constitution was ratified, the Court held, in *Chisholm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440, over the vigorous dissent of Mr. Justice Iredell, that a State was liable to suit by a citizen of another State or of a foreign country. But this decision created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted. As the Amendment did not in terms apply to a suit against a State by its own citizen, the Court had occasion, when that question was presented in *Hans v. Louisiana*, *supra* (a case alleged to arise under the Constitution of the United States), to give elaborate consideration to the application of the general principle of the immunity of States from suits brought against them without their consent. Mr. Justice Bradley delivered the opinion of the Court and, in view of the importance of the question, we quote at length from that opinion to show the reasoning which led to the decision that the suit could not be maintained. The Court said (134 U.S. page 12 et seq., 10 S.Ct. 504, 506, 33 L.Ed. 842): "Looking back from our present stand-point at the decision in *Chisholm v. Georgia*, we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the states had been expressly disclaimed, and even resented, by the great defenders of the constitution while it was on its trial before the American people." After quoting the statements of Hamilton, Madison, and Marshall, the Court continued:

"It seems to us that these views of those great advocates and defenders of the constitution were most sensible and just, and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a state. The reason against it is as strong in this case as it was

in that. It is an attempt to strain the constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that congress, when proposing the eleventh amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

"The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. \* \* \*

"The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm v. Georgia*; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone furthest in sustaining suits against the officers or agents of states."

The Court then adverted to observations of Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 5 L.Ed. 257, which favored the argument of the plaintiff in error, but as those observations were unnecessary to the decision in the case of *Cohens*, the Court was of the opinion that they should not "outweigh the important considerations referred to which lead to a different conclusion."

The same principle of immunity was reiterated and applied by the Court, upon the authority of *Hans v. Louisiana*, in *Smith v. Reeves*, *supra*, in deciding that a federal corporation could not sue a State without her consent, although, as we have seen, such a suit was not listed in the specific prohibitions of the Eleventh Amendment.

In the case of *State of South Dakota v. North Carolina*, 192 U.S. 286, 318, 24 S.Ct. 269, 48 L.Ed. 448, the Court observed that the expression in the opinion in *Hans v. Louisiana* of concurrence in the views announced by Mr. Justice Iredell in his dissenting opinion in *Chisholm v. Georgia*, could not be considered as a judgment of the Court, in view of the point which *Hans v. Louisiana* actually decided. But *South Dakota v. North Carolina* did not disturb the ruling in *Hans v. Louisiana* or the prin-

ciple which that decision applied. *South Dakota v. North Carolina* was a suit by one State against another State and did not present the question of the maintenance either of a suit by individuals against a State or by a foreign State against a State. As a suit by one State against another State, it involved a distinct and essential principle of the constitutional plan which provided means for the judicial settlement of controversies between States of the Union, a principle which necessarily operates regardless of the consent of the defendant State. The reasoning of the Court in *Hans v. Louisiana* with respect to the general principle of sovereign immunity from suits was recently reviewed and approved in *Williams v. United States*, *supra*.

The question of that immunity, in the light of the provisions of clause 1 of section 2 of article 3 of the Constitution, is thus presented in several distinct classes of cases, that is, in those brought against a State (a) by another State of the Union; (b) by the United States; (c) by the citizens of another State or by the citizens or subjects of a foreign State; (d) by citizens of the same State or by federal corporations; and (e) by foreign States. Each of these classes has its characteristic aspect, from the standpoint of the effect, upon sovereign immunity from suits, which has been produced by the constitutional scheme.

1. The establishment of a permanent tribunal with adequate authority to determine controversies between the States, in place of an inadequate scheme of arbitration, was essential to the peace of the Union. The *Federalist*, No. 80; Story on the Constitution, § 1679. With respect to such controversies, the States by the adoption of the Constitution, acting "in their highest sovereign capacity, in the convention of the people," waived their exemption from judicial power. The jurisdiction of this Court over the parties in such cases was thus established "by their own consent and delegated authority" as a necessary feature of the formation of a more perfect Union. *Rhode Island v. Massachusetts*, 12 Pet. 657, 720, 9 L.Ed. 1233; *Louisiana v. Texas*, 176 U.S. 1, 16, 17, 20 S.Ct. 251, 44 L.Ed. 347; *Missouri v. Illinois*, 180 U.S. 208, 240, 241, 21 S.Ct. 331, 45 L.Ed. 497; *Kansas v. Colorado*, 185 U.S. 125, 142, 144, 22 S.Ct. 552, 46 L.Ed. 838; *Id.*, 206 U.S. 46, 83, 85, 27 S.Ct. 655, 51 L.Ed. 956; *Commonwealth of Virginia v. West Virginia*, 246 U.S. 565, 38 S.Ct. 400, 62 L.Ed. 883.

2. Upon a similar basis rests the jurisdiction of this Court of a suit by the United States against a State, albeit without the consent of the latter. While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan. *United States v. North Carolina*, 136 U.S. 211, 10 S.Ct. 920, 34 L.Ed. 336; *United States v. Texas*, 143 U.S. 621,

644, 645, 12 S.Ct. 488, 493, 36 L.Ed. 285; *Id.*, 162 U.S. 1, 90, 16 S.Ct. 725, 40 L.Ed. 867; *United States v. Michigan*, 190 U.S. 379, 396, 23 S.Ct. 742, 47 L.Ed. 1103; *Oklahoma v. Texas*, 258 U.S. 574, 581, 42 S.Ct. 406, 66 L.Ed. 771; *United States v. Minnesota*, 270 U.S. 181, 195, 46 S.Ct. 298, 70 L.Ed. 539. Without such a provision, as this Court said in *United States v. Texas*, *supra*, "the permanence of the Union might be endangered."

3. To suits against a State, without her consent, brought by citizens of another State or by citizens or subjects of a foreign State, the Eleventh Amendment erected an absolute bar. Superseding the decision in *Chisholm v. Georgia*, *supra*, the Amendment established in effective operation the principle asserted by Madison, Hamilton, and Marshall in expounding the Constitution and advocating its ratification. The "entire judicial power granted by the Constitution" does not embrace authority to entertain such suits in the absence of the State's consent. *Ex parte State of New York*, No. 1, *supra*, page 497 of 256 U. S., 41 S.Ct. 588, 65 L.Ed. 1057; *Missouri v. Fiske*, 290 U.S. 18, 25, 26, 54 S.Ct. 18, 78 L.Ed. 145.

4. Protected by the same fundamental principle, the States, in the absence of consent, are immune from suits brought against them by their own citizens or by federal corporations, although such suits are not within the explicit prohibitions of the Eleventh Amendment. *Hans v. Louisiana*, *supra*; *Smith v. Reeves*, *supra*; *Duhne v. New Jersey*, *supra*; *Ex parte State of New York*, No. 1, *supra*.

5. We are of the opinion that the same principle applies to suits against a State by a foreign State. The decision in *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L.Ed. 25, is not opposed, as it rested upon the determination that the Cherokee nation was not a "foreign State" in the sense in which the term is used in the Constitution. The question now before us necessarily remained an open one. We think that Madison correctly interpreted clause 1 of section 2 of article 3 of the Constitution as making provision for jurisdiction of a suit against a State by a foreign State in the event of the State's consent but not otherwise. In such a case, the grounds of coercive jurisdiction which are present in suits to determine controversies between States of the Union, or in suits brought by the United States against a State, are not present. The foreign State lies outside the structure of the Union. The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates. We perceive no ground upon which it can be said that any

waiver or consent by a State of the Union has run in favor of a foreign State. As to suits brought by a foreign State, we think that the States of the Union retain the same immunity that they enjoy with respect to suits by individuals whether citizens of the United States or citizens or subjects of a foreign State. The foreign State enjoys a similar sovereign immunity and without her consent may not be sued by a State of the Union.

The question of the right of suit by a foreign State against a State of the Union is not limited to cases of alleged debts or of obligations issued by a State and claimed to have been acquired by transfer. Controversies between a State and a foreign State may involve international questions in relation to which the United States has a sovereign prerogative. One of the most frequent occasions for the exercise of the jurisdiction granted by the Constitution over controversies between States of the Union has been found in disputes over territorial boundaries. See *Rhode Island v. Massachusetts*, *supra*, page 737 of 12 Pet., 9 L.Ed. 1233. Questions have also arisen with respect to the obstruction of navigation, *South Carolina v. Georgia*, 93 U.S. 4, 23 L.Ed. 782; the pollution of streams, *Missouri v. Illinois*, 180 U.S. 208, 21 S.Ct. 331, 45 L.Ed. 497; *Id.*, 200 U.S. 496, 26 S.Ct. 268, 50 L.Ed. 572; and the diversion of navigable waters, *Wisconsin v. Illinois*, 278 U.S. 367, 49 S.Ct. 163, 73 L.Ed. 426; *Id.*, 289 U.S. 395, 400, 53 S.Ct. 671, 77 L.Ed. 1283. But in the case of such a controversy with a foreign power, a State has no prerogative of adjustment. No State can enter "into any Treaty, Alliance, or Confederation" or, without the consent of Congress, "into any Agreement or Compact \* \* \* with a foreign Power." Const. art. 1, § 10, U.S.C.A. Const. art. 1, § 10. The National Government, by virtue of its control of our foreign relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found to be appropriate, through treaty, agreement of arbitration, or otherwise. It cannot be supposed that it was the intention that a controversy growing out of the action of a State, which involves a matter of national concern and which is said to affect injuriously the interests of a foreign State, or a dispute arising from conflicting claims of a State of the Union and a foreign State as to territorial boundaries, should be taken out of the sphere of international negotiations and adjustment through a resort by the foreign State to a suit under the provisions of section 2 of article 3. In such a case, the State has immunity from suit without her consent and the National Government is protected by the provision prohibiting agreements between States and foreign powers in the absence of the consent of the Congress. While, in this

instance, the proposed suit does not raise a question of national concern, the constitutional provision which is said to confer jurisdiction should be construed in the light of all its applications.

We conclude that the Principality of Monaco, with respect to the right to maintain the proposed suit, is in no better case than the donors of the bonds, and that the application for leave to sue must be denied.

Rule discharged, and leave denied.

## CHAPTER 14

### THE FOURTEENTH AMENDMENT—GENERAL CONSIDERATIONS

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#### SLAUGHTER-HOUSE CASES.

Supreme Court of United States, 1873. 16 Wall. 36, 21 L.Ed. 394.

[Error to the Supreme Court of Louisiana. A Louisiana statute conferred upon the Crescent City Live-Stock Landing & Slaughter-House Company, a domestic corporation, the sole and exclusive right for 25 years to maintain within the parishes of Orleans, Jefferson, and St. Bernard a place for slaughtering animals to be sold for meat, and to have slaughtered therein all animals the meat of which was destined for sale in the parishes of Orleans and Jefferson. The company was to erect suitable slaughter houses and stock landings to accommodate all butchers, and was empowered to charge certain fees for the use thereof, and the animals were to be slaughtered under state inspection. The three parishes contained over 1,100 square miles and between 200,000 and 300,000 people, and the act affected the business of about 1,000 persons. In several test suits the monopoly was upheld by the Louisiana courts, and writs of error were taken.]

Mr. Justice MILLER. \* \* \* The plaintiffs in error \* \* \* allege that the statute is a violation of the Constitution of the United States in these several particulars: \* \* \*

That it creates an involuntary servitude forbidden by the thirteenth article of amendment, U.S.C.A.Const. amend. 13;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment, U.S.C.A.Const. amend. 14.

This court is thus called upon for the first time to give construction to these articles.

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to

the people of this country, and so important in their bearing upon the relations of the United States, and of the several states to each other and to the citizens of the states and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go.

Twelve articles of amendment were added to the federal Constitution soon after the original organization of the government under it in 1789, U.S.C.A.Const. amends. 1–12. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the twelfth, U.S.C.A.Const. amend. 12, adopted in eighteen hundred and three, was so nearly so as to have become, like all the others, historical and of another age. But within the last eight years three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument. U.S.C.A.Const. amends. 13–15.

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the states, for additional guarantees of human rights; additional powers to the federal government; additional restraints upon those of the states. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

\* \* \* [Here follows a brief history of the adoption of the thirteenth amendment, U.S.C.A.Const. amend. 13.]

The process of restoring to their proper relations with the federal government and with the other states those which had sided with the Rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those states of the abolition of slavery, the condition of the slave race would, without further protection of the federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the states in the legisla-

tive bodies which claimed to be in their normal relations with the federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some states forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the federal government in safety through the crisis of the Rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the states which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies. \* \* \* [Here is briefly stated the history of the adoption of the fifteenth amendment, U.S.C.A.Const. amend. 15.]

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction.

Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese cooly labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the states which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood [as saying] is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The first section of the fourteenth article, U.S.C.A.Const. amend. 14, § 1, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the states. \* \* \* “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” \* \* \* That its main purpose was to establish the citizenship of the negro can admit of no doubt.  
\* \* \*

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the

citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the word citizen of the state should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the state, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the state as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history, is to be found in the fourth of the Articles of the old Confederation.

It declares "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the Articles of the Confedera-

tion we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. \* \* \*

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens.

Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the federal government for their existence or protection, beyond the very few express limitations which the federal Constitution imposed upon the states—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the federal government. Was it the purpose of the Fourteenth amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the states to the federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of

Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the states as such, and that they are left to the state governments for security and protection, and not by this article placed under the special care of the federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the federal government, its national character, its Constitution, or its laws.

One of these is well described in the case of *Crandall v. Nevada*, 6 Wall. 36, 18 L.Ed. 745. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justices in the several states." And quoting from the language of Chief Justice Taney in another case, it is said "that

for all the great purposes for which the federal government, was established, we are one people, with one common country, we are all citizens of the United States;" and it is, as such citizens, that their rights are supported in this court in *Crandall v. Nevada*.

Another privilege of a citizen of the United States is to demand the care and protection of the federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a state. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, U.S.C.A.Const. amends. 13, 14, 15, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration. \* \* \* [This restraint upon the New Orleans butchers was held not to be a taking of their property without due process of law.]

"Nor shall any state deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the states did not conform their laws to its requirements, then by the fifth section of the article of amendment, U. S.C.A.Const. amend. 14, § 5, Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held

to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a state that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the national government from those of the state governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late Civil War. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the state organizations to combine and concentrate all the powers of the state, and of contiguous states, for a determined resistance to the general government.

Unquestionably this has given great force to the argument and added largely to the number, of those who believe in the necessity of a strong national government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the states with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the states, and to confer additional power on that of the nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between state and federal power, and we trust that

such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

Judgment affirmed.

[Dissenting opinions were given by FIELD, BRADLEY, and SWAYNE, JJ. CHASE, C. J., also dissented.]

## NOTE

1. The Supreme Court has, with one exception, maintained the interpretation of the privileges and immunities clause of Const.U.S. Amend. 14, § 1, of the Court's majority in the reported case. The exception was *Colgate v. Harvey*, 296 U.S. 404, 56 S.Ct. 252, 80 L.Ed. 299 (1935), which held that the right of a citizen of the United States to do business in, or place a loan in, a state other than that of his residence was a privilege of federal citizenship within the aforementioned clause. That case was, however, expressly overruled in *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940).

2. A minority of the Supreme Court invalidated a state law aimed at the exclusion from it of indigent persons on the score of its violation of the privileges and immunities clause of the 14th Amendment; see *Edwards v. California*, 314 U.S. 160, 62 S.Ct. 164, 86 L. Ed. 119 (1941). Recently Justices Black and Douglas, in a dissenting opinion, took the position that the guaranties of the Federal Bill of Rights had secured protection against state action by the Fourteenth Amendment; see *Adamson v. California*, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947).

3. See on the problem of the reported case, D. O. McGovney, *Privileges or Immunities Clause—14th Amendment*, 4 Ia.L.Bull. 219 (1918); Note, *The "Privileges or Immunities" Clause of the Fourteenth Amendment: Colgate v. Harvey*, 49 Harv.L.Rev. 935 (1936); Pendleton Howard, *The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey*, 87 U.Pa.L.Rev. 262 (1939).

4. See generally on the Fourteenth Amendment, H. J. Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 Yale L.Jour. 371 (1938), 48 Ibid. 171 (1938); E. S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv.L.Rev. 366, 460 (1911); E. S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 Mich.L.Rev. 247 (1914); R. A. Brown, *Due Process of Law, Police Power and the Supreme Court*, 40 Harv.L.Rev. 943 (1927); R. E. Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 Mich.L.Rev. 727 (1922); V. L. Wilkinson, *The Federal Bill of Rights and the Fourteenth Amendment*, 26 Georgetown L.Jour. 439 (1938); R. S. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 Col.L.Rev. 149 (1935).

## CIVIL RIGHTS CASES.

Supreme Court of United States, 1883. 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835.

[Writs of error to federal Circuit Courts and certificates of division of opinion among the judges below in a number of cases involving the constitutionality of the act of Congress known as the Civil Rights Act. 18 Stat. 335. Various colored persons had been denied by the proprietors of hotels, theaters, and railway companies the full enjoyment of the accommodations thereof, for reasons other than those excepted by said statute, and those proprietors had been indicted or sued for the penalty prescribed by the act. The act provided (see note below).]

Mr. Justice BRADLEY. \* \* \* Are these sections constitutional? The first section, which is the principal one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part. The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theaters; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theaters, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement, as are enjoyed by white citizens; and vice versa. The second section makes it a penal offense in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments. The power is sought, first, in the fourteenth amendment, U.S.C.A.Const. Amend. 14, and the views and arguments of distinguished senators, advanced while the law was under consideration, claiming authority to pass it by virtue of

that amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

The first section of the fourteenth amendment,—which is the one relied on,—after declaring who shall be citizens of the United States, and of the several states, is prohibitory in its character, and prohibitory upon the states. It declares that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere brutum fulmen, the last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state law and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of

carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in *U. S. v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588, *Virginia v. Rives*, 100 U.S. 313, 25 L.Ed. 667, and *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676.

An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example. The Constitution prohibited the states from passing any law impairing the obligation of contracts. This did not give to congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by state legislation might be counteracted and corrected; and this power was exercised. The remedy which congress actually provided was that contained in the twenty-fifth section of the judiciary act of 1789 [1 Stat. 85], giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of state courts whenever they should sustain the validity of a state statute or authority, alleged to be repugnant to the Constitution or laws of the United States. By this means, if a state law was passed impairing the obligation of a contract, and the state tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts generally, and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a state law; and, under the broad provisions of the act of March 3, 1875 [18 Stat. 470, c. 137], giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists. But under that or any other law, it must appear, as well by allegation as proof at the trial, that the Constitution had been violated by the action of the state legislature. Some obnoxious state law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any federal remedy in the case, and for the very sufficient

reason that the constitutional prohibition is against *state laws* impairing the obligation of contracts.

And so in the present case, until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against state laws and acts done under state authority. Of course, legislation may and should be provided in advance to meet the exigency when it arises, but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, state laws or state action of some kind adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make congress take the place of the state legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty, and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a state to any persons of the equal protection of the laws is prohibited by the amendment, therefore congress may establish laws for their equal protection. In fine, the legislation which congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce and which by the amendment they are prohibited from making or enforcing, or such acts and proceedings as the states may commit or take, and which by the amendment they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the fourteenth amendment on the part of the states. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses,

and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the states; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as to those which arise in states that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not congress, with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the states may deprive persons of life, liberty, and property without due process of law, (and the amendment itself does suppose this,) why should not congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theaters. The truth is that the implication of a power to legislate in this manner is based upon the assumption that if the states are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon congress to enforce the prohibition, this gives congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant to the tenth amendment of the Constitution, U.S.C.A.Const. Amend. 10, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

We have not overlooked the fact that the fourth section of the act, 8 U.S.C.A. § 44, now under consideration has been held by this court to be constitutional. That section declares "that no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any state, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to

summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars." In *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676, it was held that an indictment against a state officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the state government, carry into effect such a rule of disqualification. In the *Virginia* case, the state, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute-book of the state actually laid down any such rule of disqualification or not, the state, through its officer, enforced such a rule; and it is against such state action, through its officers and agents, that the last clause of the section is directed. This aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act which we are now considering. \* \* \*

[After distinguishing the so-called "Civil Rights Bill" of 1866 and 1868 (14 Stat. 27; 16 Stat. 140), which made guilty of a misdemeanor any person who, under color of any law, statute, ordinance, regulation or custom, subjected any inhabitant of a state or territory to the deprivation of any of certain enumerated important civil rights:] The civil rights bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it under color or pretense that it had been rendered void or invalid by a state law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defense.

In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his

property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the state where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the state by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the congress with power to provide a remedy. This abrogation and denial of rights, for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration.

Of course, these remarks do not apply to those cases in which congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes, the coining of money, the establishment of post-offices and post-roads, the declaring of war, etc. In these cases congress has power to pass laws for regulating the subjects specified, in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular state legislation or state action in reference to that subject, the power given is limited by its object, and any legislation by congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.

If the principles of interpretation which we have laid down are correct, as we deem them to be,—and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of *U. S. v. Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290,—it is clear that the law in question cannot be sustained by any grant of legislative power made to congress by the fourteenth amendment. That amendment prohibits the states from denying to any person the equal protection of the laws, and declares that congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse state legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces state legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon congress by the fourteenth amendment, U.S. C.A.Const. Amend. 14, and, in our judgment, it has not. \* \* \*

We must not forget that the province and scope of the thirteenth and fourteenth amendments are different: the former simply abolished slavery: the latter prohibited the states from abridging the privileges or immunities of citizens of the United States, from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of congress under them are different. What congress has power to do under one, it may not have power to do under the other. Under the thirteenth amendment, it has only to do with slavery and its incidents. Under the fourteenth amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States; or to deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Under the thirteenth amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery

and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not; under the fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings. \* \* \*

Innkeepers and public carriers, by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the fourteenth amendment, congress has full power to afford a remedy under that amendment and in accordance with it.

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. \* \* \*

On the whole, we are of opinion that no countenance of authority for the passage of the law in question can be found in either the thirteenth or fourteenth amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several states is concerned.

Judgment accordingly.

[HARLAN, J., gave a dissenting opinion.]

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### SCREWS v. UNITED STATES.

Supreme Court of the United States, 1945.  
325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495.

Mr. Justice DOUGLAS announced the judgment of the Court and delivered the following opinion, in which the CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice REED, concur.

This case involves a shocking and revolting episode in law enforcement. Petitioner Screws was sheriff of Baker County, Georgia. He enlisted the assistance of petitioner Jones, a policeman, and petitioner Kelley, a special deputy, in arresting Robert Hall, a citizen of the United States and of Georgia. The arrest was made late at night at Hall's home on a warrant charging

Hall with theft of a tire. Hall, a young negro about thirty years of age, was handcuffed and taken by car to the court house. As Hall alighted from the car at the court house square, the three petitioners began beating him with their fists and with a solid-bar blackjack about eight inches long and weighing two pounds. They claimed Hall had reached for a gun and had used insulting language as he alighted from the car. But after Hall, still handcuffed, had been knocked to the ground they continued to beat him from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the court house yard into the jail and thrown upon the floor dying. An ambulance was called and Hall was removed to a hospital where he died within the hour and without regaining consciousness. There was evidence that Screws held a grudge against Hall and had threatened to "get" him.

An indictment was returned against petitioners—one count charging a violation of § 20 of the Criminal Code, 18 U.S.C. § 52, 18 U.S.C.A. § 52, and another charging a conspiracy to violate § 20 contrary to § 37 of the Criminal Code, 18 U.S.C. § 88, 18 U.S.C.A. § 88. Sec. 20 provides:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000, or imprisoned not more than one year or both."

The indictment charged that petitioners, acting under color of the laws of Georgia, "willfully" caused Hall to be deprived of "rights, privileges, or immunities secured or protected" to him by the Fourteenth Amendment—the right not to be deprived of life without due process of law; the right to be tried, upon the charge on which he was arrested, by due process of law and if found guilty to be punished in accordance with the laws of Georgia; that is to say that petitioners "unlawfully and wrongfully did assault, strike and beat the said Robert Hall about the head with human fists and a blackjack causing injuries" to Hall "which were the proximate and immediate cause of his death." A like charge was made in the conspiracy count.

The case was tried to a jury. The court charged the jury that due process of law gave one charged with a crime the right to be tried by a jury and sentenced by a court. On the question

of intent it charged that “\* \* \* if these defendants, without its being necessary to make the arrest effectual or necessary to their own personal protection, beat this man, assaulted him or killed him while he was under arrest, then they would be acting illegally under color of law, as stated by this statute, and would be depriving the prisoner of certain constitutional rights guaranteed to him by the Constitution of the United States and consented to by the State of Georgia.”

The jury returned a verdict of guilty and a fine and imprisonment on each count was imposed. The Circuit Court of Appeals affirmed the judgment of conviction, one judge dissenting. 5 Cir., 140 F.2d 662. The case is here on a petition for a writ of certiorari which we granted because of the importance in the administration of the criminal laws of the questions presented. 322 U.S. 718, 64 S.Ct. 946, 88 L.Ed. 1558. \* \* \*

Moreover, the history of § 20 affords some support for that narrower construction. As we have seen, the word “willfully” was not added to the Act until 1909. Prior to that time it may be that Congress intended that he who deprived a person of any right protected by the Constitution should be liable without more. That was the pattern of criminal legislation which has been sustained without any charge or proof of scienter. *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 30 S.Ct. 663, 54 L.Ed. 930; *United States v. Balint*, *supra*. And the present Act in its original form would have been susceptible of the same interpretation apart from the equal protection clause of the Fourteenth Amendment, where “purposeful discriminatory” action must be shown. *Snowden v. Hughes*, 321 U.S. 1, 8, 9, 64 S.Ct. 397, 401, 402, 88 L.Ed. 497. But as we have seen, the word “willfully” was added to make the section “less severe”. We think the inference is permissible that its severity was to be lessened by making it applicable only where the requisite bad purpose was present, thus requiring specific intent not only where discrimination is claimed but in other situations as well. We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of laws saves the Act from any charge of unconstitutionality on the grounds of vagueness.

Once the section is given that construction, we think that the claim that the section lacks an ascertainable standard of guilt must fail. \* \* \*

The difficulty here is that this question of intent was not submitted to the jury with the proper instructions. \* \* \*

III. It is said, however, that petitioners did not act "under color of any law" within the meaning of § 20 of the Criminal Code. We disagree. We are of the view that petitioners acted under "color" of law in making the arrest of Robert Hall and in assaulting him. They were officers of the law who made the arrest. By their own admissions they assaulted Hall in order to protect themselves and to keep their prisoner from escaping. It was their duty under Georgia law to make the arrest effective. Hence, their conduct comes within the statute.

Some of the arguments which have been advanced in support of the contrary conclusion suggest that the question under § 20 is whether Congress has made it a federal offense for a state officer to violate the law of his State. But there is no warrant for treating the question in state law terms. The problem is not whether state law has been violated but whether an inhabitant of a State has been deprived of a federal right by one who acts under "color of any law." He who acts under "color" of law may be a federal officer or a state officer. He may act under "color" of federal law or of state law. The statute does not come into play merely because the federal law or the state law under which the officer purports to act is violated. It is applicable when and only when some one is deprived of a federal right by that action. The fact that it is also a violation of state law does not make it any the less a federal offense punishable as such. Nor does its punishment by federal authority encroach on state authority or relieve the state from its responsibility for punishing state offenses.

We agree that when this statute is applied to the action of state officials, it should be construed so as to respect the proper balance between the States and the federal government in law enforcement. Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States. Cf. *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429, dealing with assaults by federal officials. The Fourteenth Amendment did not alter the basic relations between the States and the national government. *United States v. Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290; *In re Kemmler*, 136 U.S. 436, 448, 10 S.Ct. 930, 934, 34 L.Ed. 519. Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated pow-

ers, has created offenses against the United States. *Jerome v. United States*, 318 U.S. 101, 105, 63 S.Ct. 483, 486, 87 L.Ed. 640. As stated in *United States v. Cruikshank*, 92 U.S. 542, 553, 554, 23 L.Ed. 588, "It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself." And see *United States v. Fox*, 95 U.S. 670, 672, 24 L.Ed. 538. It is only state action of a "particular character" that is prohibited by the Fourteenth Amendment and against which the Amendment authorizes Congress to afford relief. *Civil Rights Cases*, 109 U.S. 3, 11, 13, 3 S.Ct. 18, 21, 23, 27 L.Ed. 835. Thus Congress in § 20 of the Criminal Code did not undertake to make all torts of state officials federal crimes. It brought within § 20 only specified acts done "under color" of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States.

This section was before us in *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368, where we said: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." In that case state election officials were charged with failure to count the votes as cast, alteration of the ballots, and false certification of the number of votes cast for the respective candidates. 313 U.S. at pages 308, 309, 61 S.Ct. at pages 1034, 1035, 85 L.Ed. 1368. We stated that those acts of the defendants "were committed in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election." *Id.*, 313 U.S. at pages 325, 326, 61 S.Ct. at pages 1042, 1043, 85 L.Ed. 1368. In the present case, as we have said, the defendants were officers of the law who had made an arrest and who by their own admissions made the assault in order to protect themselves and to keep the prisoner from escaping, i. e. to make the arrest effective. That was a duty they had under Georgia law. *United States v. Classic* is, therefore, indistinguishable from this case so far as "under color of" state law is concerned. In each officers of the State were performing official duties; in each the power which they were authorized to exercise was misused. We cannot draw a distinction between them unless we are to say that § 20 is not applicable to police officers. But the broad sweep of its language leaves no room for such an exception.

It is said that we should abandon the holding of the Classic case. It is suggested that the present problem was not clearly in focus in that case and that its holding was ill-advised. A reading of the opinion makes plain that the question was squarely involved and squarely met. It followed the rule announced in *Ex parte Commonwealth of Virginia*, 100 U.S. 339, 346, 25 L.Ed. 676, that a state judge who in violation of state law discriminated against negroes in the selection of juries violated the Act of March 1, 1875, 18 Stat. 336. It is true that that statute did not contain the words under "color" of law. But the Court in deciding what was state action within the meaning of the Fourteenth Amendment held that it was immaterial that the state officer exceeded the limits of his authority. " \* \* \* as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." 100 U.S. at page 347, 25 L.Ed. 676. And see *Commonwealth of Virginia v. Rives*, 100 U.S. 313, 321, 25 L.Ed. 667. The Classic case recognized, without dissent, that the contrary view would defeat the great purpose which § 20 was designed to serve. Reference is made to statements of Senator Trumbull in his discussion of § 2 of the Civil Rights Act of 1866, 14 Stat. 27, and to statements of Senator Sherman concerning the 1870 Act as supporting the conclusion that "under color of any law" was designed to include only action taken by officials pursuant to state law. But those statements in their context are inconclusive on the precise problem involved in the Classic case and in the present case. We are not dealing here with a case where an officer not authorized to act nevertheless takes action. Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under "color" of law means under "pretense" of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea. \* \* \*

But beyond that is the problem of *stare decisis*. The construction given § 20 in the Classic case formulated a rule of law which has become the basis of federal enforcement in this important

field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have here a situation comparable to *Mahnich v. Southern S. S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The Classic case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent re-examination. The meaning which the Classic case gave to the phrase "under color of any law" involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of § 20 to meet the exigencies of each case coming before us.

Since there must be a new trial, the judgment below is reversed.

Reversed.

#### NOTE

1. See *Screws v. United States—The Police Brutality Case*, 31 Cornell L.Quar. 48 (1945). On the general problem of the power of Congress under Section 5 of the Fourteenth Amendment to enforce the provisions of that Amendment, see Note, *The Enabling Clause of the Fourteenth Amendment: A Reservoir of Congressional Power*, 33 Col.L.Rev. 854 (1933).

2. The prohibitions of Section 1 of the Fourteenth Amendment apply to the state regardless of the department or agency through which it acts. It applies to the state's executive department, *Sterling v. Constantin*, 287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375 (1933); its judicial department, *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676 (1880); *American Federation of Labor v. Swing*, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855 (1941); its public service commissions, *Reagan v. Farmers Loan & Trust Co.*, 154 U.S. 362, 14 S.Ct. 1047, 38 L.Ed. 1014 (1894); and the governing boards of its publicly operated colleges, *Hamilton v. University of California Regents*, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343 (1934).

The Supreme Court has recently held that the judicial enforcement by a state court of restrictive covenants in deeds between private parties that discriminated against occupancy by persons not of the Caucasian race involved action by the state so as to render the discrimination violative of the equal protection clause of the Fourteenth Amendment, *Shelley v. Kraemer*, — U.S. —, 68 S.Ct. 836, 92 L.Ed. — (1948).

3. It is at times rather difficult to determine whether or not the action complained of is that of the state or merely of private persons. This has been the principal issue in the series of cases involving the constitutionality of excluding negroes from primary elections of the Democratic party; the Supreme Court's course in dealing with it can be traced through *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927); *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292 (1935); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). See Note, *Due Process as a Substantive Restriction Upon Judicial Decisions*, 34 Col.L. Rev. 891 (1934); Note, *The Disintegration of a Concept—State Action Under the 14th and 15th Amendments*, 96 U.Pa.L.Rev. 402 (1948).

4. That a state is deemed to act when it seeks to enforce its legislation, even though such legislation is in conflict with the federal Constitution, was held in *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510 (1913); cf. *Barney v. City of New York*, 193 U.S. 430, 24 S.Ct. 502, 48 L.Ed. 737 (1904), involving action by a public official in excess of, or in disregard of his authority; see S. S. Issek, *Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Actions of State Officials*, 40 Harv.L.Rev. 969 (1927). It is also deemed to act when the inaction or delay of one of its agencies permits the positive acts of another of its agencies to become effective, *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 46 S.Ct. 408, 70 L.Ed. 747 (1926); *Cumberland Coal Co. v. Board of Revision of Tax Assessments of Cumberland County*, 284 U.S. 23, 52 S.Ct. 48, 76 L.Ed. 146 (1931).

5. The due process and equal protection clauses of the Fourteenth Amendment protect aliens, *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915); private corporations, *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 27 S.Ct. 384, 51 L.Ed. 520 (1907); but not municipal corporations of the state itself, *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933). See D. J. Farage, *Non-Natural Persons and the Guarantee of "Liberty" Under the Due Process Clause*, 28 Ky.L.Jour. 269 (1940).

6. For discussion of when a person is deemed to be "within the jurisdiction" of a state for purposes of invoking the equal protection clause of the Fourteenth Amendment, see *Kentucky Finance Corp'n v. Paramount Auto Exchange Corp'n*, 262 U.S. 544, 43 S.Ct. 636, 67 L.Ed. 1112 (1923).

## CHAPTER 15

### DUE PROCESS AND EQUAL PROTECTION. REGULATION OF ECONOMIC ACTIVITIES<sup>1</sup>

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#### OLD DEARBORN DISTRIBUTING CO. v. SEAGRAM DISTILLERS CORP.

Supreme Court of the United States, 1936. 299 U.S. 183, 57 S.Ct. 139,  
81 L.Ed. 109, 106 A.L.R. 1476.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

These appeals bring here for decision the question of the constitutional validity of sections 1 and 2 of the Fair Trade Act of Illinois, Smith-Hurd Ill.Stats., c. 121½, § 188 et seq.; Illinois Rev.Stat.1935, c. 140, § 8 et seq., providing as follows:

"Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

"Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

"(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

"(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

"(3) By any officer acting under the orders of any court.

"Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

Section 3 of the act, Smith-Hurd Ill.Stats., c. 121½, § 190, provides that it shall not apply to contracts or agreements between producers or between wholesalers or between retailers as to sale or resale prices.

No. 226 is a suit brought by appellee against appellant to enjoin the latter from wilfully and knowingly advertising, offering for sale, or selling, certain brands of whisky at less than prices stipulated by appellee in accordance with contracts, made in pursuance of the Fair Trade Act, between appellee and distributors or retailers of such whisky. The facts set forth by the court below follow.

Appellee is a dealer in alcoholic beverages at wholesale. It buys the products here in question from the producers. The whiskies bear labels and trade-marks, and are in fair and open competition with commodities of the same general class produced by others. Appellant is a corporation operating four retail liquor stores in Chicago, and selling at both wholesale and retail. Appellee's sales in Chicago are made to wholesale distributors. It has not sold any of the whiskies in controversy to appellant, but has sold other liquors. Contracts in pursuance of the Fair Trade Act have been executed between appellee and certain distributors, and numerous Illinois retailers. Appellee does not sell directly to any retailer. Appellant sold the products in question at cut prices—that is to say, at prices below those stipulated—and continued to do so after appellee's demand that it cease such practice. The result of such price cutting was a diminution of sales during the price-cutting period suffered by appellee and retailers other than appellant. Some dealers ceased to display the products, and notified appellee that they could not compete with appellant and would discontinue handling the products unless the price cutting was stopped. Appellant was also a party to breaches of other fair trade contracts between appellee and certain distributors, and continued the price cutting throughout the trial of the case in the Illinois state court of first instance.

The record shows that one of the retailer's contracts drawn in pursuance of the act was signed by appellant's secretary and treasurer prior to the commission of the acts complained of.

This contract, among other things, provided that the product in question should not be sold, advertised, or offered for sale in Illinois below the prices to be stipulated by appellee. The contract was assailed by appellant below as ineffective, and for present purposes we accept that view. It is plain enough, however, that appellant had knowledge of the original contractual restrictions and that they constituted conditions upon which sales thereafter were to be made.

No. 372 is a suit of the same character as No. 226, seeking the same relief by injunction. The facts set forth in the complaint were admitted by a motion to dismiss. These facts, fully stated in the opinion of the court below, *infra*, we find it unnecessary to repeat. It is enough to say that while they differ in detail from those appearing in No. 226, they are sufficiently the same in substance as to be controlled by the same principles of law.

Both appellants attack the validity of the act upon the grounds that it denies due process of law and the equal protection of the laws in violation of the Fourteenth Amendment, U.S.C.A.Const. Amend. 14, in the particulars which hereafter appear. The state courts of first instance in which the suits were brought sustained the validity of the act and entered decrees as prayed for in the bills of complaint. These decrees were affirmed upon appeal by the court below. *Joseph Triner Corporation v. McNeil*, 363 Ill. 559, 2 N.E.2d 929, 104 A.L.R. 1435; *Seagram-Distillers Corporation v. Old Dearborn Distributing Co.*, 363 Ill. 610, 611, 2 N.E.2d 940.

The Illinois statute constitutes a legislative recognition of a rule which had been accepted by many of the state courts as valid at common law. This rule was based upon the distinction found to exist between articles of trade put out by the manufacturer or producer under and identified by patent, copyright, trade-mark, brand, or similar device and articles of like character put out by others and not so identified. The same rule was followed for a time by some of the lower federal courts; but their decisions were upset by this court in a series of cases, of which *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502, is an example. In that case this court held that a system of contracts between manufacturers and wholesale and retail merchants which sought to control the prices for sales by all such dealers by fixing the amount which the consumer should pay, amounted to an unlawful restraint of trade, invalid at common law and, so far as interstate commerce was affected, invalid under the Sherman Anti-

Trust Act of July 2, 1890, 15 U.S.C.A. §§ 1-7, 15 note; and it was held that the rule applied to such agreements notwithstanding the fact that they related to proprietary medicines made under a secret process and identified by distinctive packages, labels, and trade-marks. The argument that since the manufacturer might make and sell or not as he chose, he could lawfully condition the price at which subsequent sales could be made by the purchaser, was rejected.

"If there be an advantage to the manufacturer in the maintenance of fixed retail prices," this court said at pages 407-409 of 220 U.S., at pages 384, 385, of 31 S.Ct., 55 L.Ed. 502, "the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system. \* \* \* The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of commerce, and the rules concerning the freedom of trade must be held to apply to it. \* \* \* The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

It is unnecessary to review the contrary state decisions. It is enough, for present purposes, to say that, generally speaking, they sustained contracts standardizing the price at which "identified" commodities subsequently might be sold, where the price standardization is primarily effected to protect the good will created or enlarged by the identifying mark or brand. Where a manufacturer puts out an article of general production identified by a special trade-mark or brand, the result of an agreement fixing the subsequent sales price affects competition between the identified articles alone, leaving competition between articles so identified by a given manufacturer and all other articles of like kind to have full play. In other words, such restraint upon com-

petition as there may be is strictly limited to that portion of the entire product put out and plainly identified by a particular manufacturer or producer.

The ground upon which the opposing view of this court proceeds is that such an agreement, nevertheless, constitutes an unlawful restraint of trade at common law and, in respect of interstate commerce, a violation of the Sherman Anti-Trust Act. A careful reading of the decisions discloses no other ground.

Following these decisions, bills were introduced in Congress from time to time authorizing standardization of price agreements in respect of identified goods, upon which extensive hearings were held by the appropriate congressional committees. These bills are in all essential respects like the Illinois act. The hearings disclose exhaustive legal briefs, and testimony and arguments for and against the economic value of the proposed laws. See, for example, Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, on H.R. 13305 (63d Cong., 2d and 3d Sess.); H.R. 13568 (64th Cong., 1st and 2d Sess.); compare Report of the Federal Trade Commission on Resale Price Maintenance, 70th Cong., 2d Sess., H.Doc. No. 546.

It is not without significance that while the proposed legislation was vigorously assailed in other respects, we do not find that any constitutional objection was urged. And the decisions of this court, far from suggesting any constitutional infirmity in such proposed legislation, contain implications to the contrary. In the *Dr. Miles Medical Co. Case*, 220 U.S. 373, at page 405, 31 S.Ct. 376, 383, 55 L.Ed. 502, the court said: "Nor can the manufacturer by rule and notice, *in the absence of contract or statutory right*, even though the restriction be known to purchasers, fix prices for future sales." (Italics supplied.) In *Boston Store v. American Graphophone Co.*, 246 U.S. 8, at page 26, 38 S.Ct. 257, 62 L.Ed. 551, Ann.Cas.1918C, 447, where this court struck down a stipulation that patented articles should not be resold at prices other than those fixed presently and from time to time by the patent owner, it was suggested that if this view resulted in damage to the holders of patent rights or the law afforded insufficient protection to the inventor, the remedy lay within the scope of legislative (that is to say, congressional) action. And in a concurring opinion (246 U.S. at page 28, 38 S.Ct. at page 262, 62 L.Ed. 551, Ann.Cas.1918C, 447), it was said: "If the rule so declared is believed to be harmful in its operation, the remedy may be found, as it has been sought, through application to the Congress." The words "as it has

been sought" quite evidently referred to the bills of which we have just spoken, since they had theretofore been introduced and made the subject of the hearings. See, also, *Bauer & Cie v. O'Donnell*, 229 U.S. 1, 12, 33 S.Ct. 616, 57 L.Ed. 1041, 50 L.R.A., N.S., 1185, Ann.Cas.1915A, 150. While these observations of the court cannot, of course, be regarded as decisive of the question, they plainly imply that the court at the time foresaw no valid constitutional objection to such legislation, for it cannot be supposed that the court would suggest a legislative remedy the validity of which might seem open to doubt.

In the light of the foregoing brief résumé of the question with respect to the standardization of selling prices of identified goods in the absence of statutory authority, we proceed to a consideration of the specific objections to the constitutionality of the act here under review.

First. In respect of the due process of law clause, it is contended that the statute is a price-fixing law, which has the effect of denying to the owner of property the right to determine for himself the price at which he will sell. Appellants invoke the well-settled general principle that the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments, U.S.C.A.Const. Amends. 5, 14. *Tyson & Brother United Theatre Ticket Offices v. Banton*, 273 U.S. 418, 429, 47 S.Ct. 426, 427, 428, 71 L.Ed. 718, 58 A.L.R. 1236; *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 537, 43 S.Ct. 630, 633, 67 L.Ed. 1103, 27 A.L.R. 1280; *Ribnik v. McBride*, 277 U.S. 350, 48 S.Ct. 545, 72 L.Ed. 913, 56 A.L.R. 1327; *Williams v. Standard Oil Co.*, 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287, 60 A.L.R. 596; *New State Ice Co. v. Liebmann*, 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747. These cases hold that, with certain exceptions which need not now be set forth, this right of the owner cannot be denied by legislative enactment fixing prices and compelling such owner to adhere to them. But the decisions referred to deal only with legislative price fixing. They constitute no authority for holding that prices in respect of "identified" goods may not be fixed under legislative leave by contract between the parties. The Illinois Fair Trade Act does not infringe the doctrine of these cases.

Section 1, *Smith-Hurd Ill.Stats. c. 121½*, § 188, affirms the validity of contracts of sale or resale of commodities identified by the trade-mark, brand, or name of the producer or owner, which are in fair and open competition with commodities of the same general class produced by others, notwithstanding that

such contracts stipulate: (1) That the buyer will not resell except at the price stipulated by the vendor; and (2) that the producer or vendee of such a commodity shall require, upon the sale to another, that he agree in turn not to resell except at the price stipulated by such producer or vendee. It is clear that this section does not attempt to fix prices, nor does it delegate such power to private persons. It *permits* the designated private persons to contract with respect thereto. It contains no element of compulsion but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they may see fit. Thus far, the act plainly is not open to objection; and none seems to be made.

The challenge is directed against section 2, Smith-Hurd Ill. Stats. c. 121½, § 189, which provides that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract made under section 1, whether the person doing so is or is not a party to the contract, shall constitute unfair competition, giving rise to a right of action in favor of anyone damaged thereby.

It is first to be observed that section 2 reaches not the *mere* advertising, offering for sale, or selling at less than the stipulated price, but the doing of any of these things *willfully* and *knowingly*. We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling price, but of a purchaser who has had definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds willfully to resell in disregard of it.

In the second place, section 2 does not deal with the restriction upon the sale of the commodity qua commodity, but with that restriction because the commodity is identified by the trade-mark, brand, or name of the producer or owner. The essence of the statutory violation then consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand, or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself.

Appellants here acquired the commodity in question with full knowledge of the then existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such

knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under section 2 of the law by which such acquisition was conditioned. Cf. *Provident Institution v. Jersey City*, 113 U.S. 506, 514, 515, 5 S.Ct. 612, 28 L.Ed. 1102; *Vreeland v. O'Neil*, 36 N.J.Eq. 399, 402; same case on appeal, *Vreeland v. Mayor, etc., of Jersey City*, 37 N.J.Eq. 574, 577.

We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others, such as was condemned in *Eubank v. Richmond*, 226 U.S. 137, 143, 33 S.Ct. 76, 57 L.Ed. 156, 42 L.R.A., N.S., 1123; *State of Washington, ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121, 122, 49 S.Ct. 50, 51, 52, 73 L.Ed. 210, 86 A.L.R. 654; and *Carter v. Carter Coal Co.*, 298 U.S. 238, 311, 56 S.Ct. 855, 872, 873, 80 L.Ed. 1160. In those cases the property affected had been acquired without any preexisting restriction in respect of its use or disposition. The imposition of the restriction in invitum was authorized after complete and unrestricted ownership had vested in the persons affected. Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it.

Nor is section 2 so arbitrary, unfair or wanting in reason as to result in a denial of due process. We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trade-mark stands. Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such good will. It is well settled that the proprietor of the good will “is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority.” *McLean v. Fleming*, 96 U.S. 245, 252, 24 L.Ed. 828. “Courts afford redress or relief upon the ground that a party has a valuable interest in the good will of his trade or business, and in the trademarks adopted to maintain and extend it.” *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412, 36 S.Ct. 357, 360, 60 L.Ed. 713. The ownership of the good will, we repeat,

remains unchanged, notwithstanding the commodity has been parted with. Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates "unfair competition." See *Liberty Warehouse Co. v. Burley Tobacco Growers' Ass'n*, 276 U.S. 71, 91, 92, 96, 97, 48 S.Ct. 291, 295, 296, 297, 72 L.Ed. 473. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end.

There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned. Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the Legislature. *Radice v. New York*, 264 U.S. 292, 294, 44 S.Ct. 325, 326, 68 L.Ed. 690, *Zahn v. Board of Public Works*, 274 U.S. 325, 328, 47 S.Ct. 594, 595, 71 L.Ed. 1074, and cases cited.

Certain terms contained in the act are said to be fatally vague and indefinite and therefore to deny due process of law under our decisions in *Connally v. General Const. Co.*, 269 U.S. 385, 390, 46 S.Ct. 126, 127, 70 L.Ed. 322, et seq., and other cases. The contention is directed in the main against the phrase in section 1 of the act, "fair and open competition," and "any commodity" and "any contract entered into pursuant to the provisions of section 1" contained in section 2. The point is shown

Case, 269 U.S. 385, at pages 391, 392, 46 S.Ct. 126, 127, 128, 70 L.Ed. 322, and the cases there cited. See particularly Hygrade Provision Co. v. Sherman, 266 U.S. 497, 501-503, 45 S. Ct. 141, 142, 143, 69 L.Ed. 402; United States v. L. Cohen Grocery Co., 255 U.S. 81, 92, 41 S.Ct. 298, 301, 65 L.Ed. 516, 14 A.L.R. 1045, where it is said "that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." Certainly, the phrase "fair and open competition" is as definite as the phrase contained in section 5 of the Federal Trade Commission Act, 15 U.S.C.A. § 45, "unfair *methods* of competition," which this court has never regarded as being fatally uncertain. Federal Trade Commission v. Gratz, 253 U. S. 421, 427, 40 S.Ct. 572, 574, 64 L.Ed. 993; Federal Trade Commission v. Beech-Nut Co., 257 U.S. 441, 453, 40 S.Ct. 572, 574, 64 L.Ed. 993; Federal Trade Commission v. Raladam Co., 283 U.S. 643, 648, 51 S.Ct. 587, 590, 75 L.Ed. 1324, 79 A.L.R. 1191. We think the phrases complained of are sufficiently definite, considering the whole statute; and that no one need be misled as to their meaning, or need suffer by reason of any supposed uncertainty. Cf. Miller v. Schoene, 276 U.S. 272, 281, 48 S.Ct. 246, 248, 72 L.Ed. 568; Standard Oil Co. v. United States, 221 U.S. 1, 69, 31 S.Ct. 502, 55 L.Ed. 619, 34 L.R.A., N.S., 834, Ann.Cas.1912D, 734.

Second. The contention that section 2 of the act denies the equal protection of the laws in violation of the Fourteenth Amendment proceeds upon the view that it confers a privilege upon the producers and owners of goods identified by trademark, brand, or name, which it denies in the case of unidentified goods. As this court many times has said, the equal protection clause does not preclude the states from resorting to classification for the purposes of legislation. It only requires that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Colgate v. Harvey*, 296 U.S. 404, 422, 423, 56 S.Ct. 252, 255, 256, 80 L.Ed. 299, 102 A.L.R. 54, and cases cited.

Clearly, the challenged section of the Illinois act satisfies this test. Enough appears already in this opinion to show the essential difference between trade-marked goods and others not so identified. The entire struggle to bring about legislation such as the Illinois act embodies has been based upon this essential difference. In *Radice v. New York*, 264 U.S. 292, 296, 297, 44 S.Ct. 325, 327, 68 L.Ed. 690, we sustained a statute pro-

hibiting night employment of women in restaurants in large cities, against the claim that it denied equal protection of the laws in that it did not apply to small cities, or to women employed as singers and performers, or to attendants in ladies' cloak rooms and parlors, or employees in hotel dining rooms and kitchens or in lunch rooms and restaurants conducted by employers for the benefit of their employees. Former decisions of the court were cited sustaining classifications based upon differences between fire insurance and other kinds of insurance; between railroads and other corporations; between barbershop employment and other kinds of labor; between "immigrant agents" engaged in hiring laborers to be employed beyond the limits of a state and persons engaged in the business of hiring for labor within the state; between sugar refiners who produce the sugar and those who purchase it. Other illustrations of a similar character might be cited.

But it is unnecessary to pursue the subject further; for, since the sole purpose of the present law is to afford a legitimate remedy for an injury to the good will which results from the use of trade-marks, brands, or names, it is obvious that its provisions would be wholly inapplicable to goods which are unmarked.

Decrees affirmed.

Mr. Justice STONE took no part in the consideration or decision of this case.

#### NOTE

1. It has been stated that a state is not prevented by either the due process or equal protection clauses of the Fourteenth Amendment from adopting "whatever economic policy may reasonably be deemed to promote the public welfare," and from enforcing "that policy by legislation adapted to that purpose," *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934). The Supreme Court has sustained state legislation enacted to preserve competition, *Grenada Lumber Co. v. Mississippi*, 217 U.S. 433, 30 S.Ct. 535, 54 L.Ed. 826 (1910); *Central Lumber Co. v. South Dakota*, 226 U.S. 157, 33 S.Ct. 66, 57 S.Ct. 164 (1912); cf. *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1, 47 S.Ct. 506, 71 L.Ed. 893 (1927); or to protect the public against what the legislature deems to be the evils of excessive competition, *Nebbia v. New York*, *supra*.

2. The equal protection clause does not prevent a state from exempting from some provisions of its anti-monopoly legislation such producers as farmers and stockmen, *Tigner v. Texas*, 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124 (1940), which expressly overruled *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 22 S.Ct. 431, 46 L.Ed. 679 (1902). The Court stated that "Since *Connolly's Case* was decided, nearly forty years ago, an impressive legislative move-

ment bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. The states as well as the United States have sanctioned cooperative action by farmers; have restricted their amenability to anti-trust laws; have relieved their organizations from taxation. Such expressions of legislative policy have withstood challenge in the courts. \* \* \* And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature." (145-147).

3. That a state may promote one form of conducting economic activities by favorable legislation not applied to competing forms is held in *Liberty Warehouse Co. v. Burley Tobacco Growers Co-op Marketing Ass'n*, 276 U.S. 71, 48 S.Ct. 291, 72 L.Ed. 473 (1928).

4. The slight variations in regulatory legislation relied upon by courts in determining the reasonableness, and thus the validity, of such legislation is illustrated by two cases involving local ordinances regulating the weight of loaves of bread; see *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813 (1924), and *Petersen Baking Co. v. Bryan*, 290 U.S. 570, 54 S.Ct. 277, 78 L.Ed. 505 (1934).

5. See, generally, on due process *J. A. C. Grant*, *The Natural Law Background of Due Process*, 31 Col.L.Rev. 56 (1931); *R. A. Brown*, *Due Process of Law, Police Power, and the Supreme Court*, 40 Harv.L.Rev. 943 (1927); *R. E. Cushman*, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 Mich.L.Rev. 737 (1922).

6. On the use of the state's police power to protect certain interests not primarily economic in character, see *R. A. Brown*, *Police Power—Legislation for Health and Personal Safety*, 42 Harv.L.Rev. 866 (1929).

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### OSBORN v. OZLIN.

Supreme Court of the United States, 1940.  
310 U.S. 53, 60 S.Ct. 758, 84 L.Ed. 1074.

Mr. Justice FRANKFURTER delivered the opinion of the Court.

Appellants have challenged the validity of a Virginia statute regulating the insurance of Virginia risks and have brought this suit to enjoin state officers from enforcing it. Its relevant provisions forbid contracts of insurance or surety by companies authorized to do business within that Commonwealth "except through regularly constituted and registered resident agents or agencies of such companies." § 4222, c. 218, Acts of 1938. Such resident agents "shall be entitled to and shall receive the usual and customary commissions allowed on such contracts," and may not share more than half of this commission with a non-resident broker. § 4226a, as amended by Acts 1938, c. 218. Disobedience

of these provisions (from which life, title and marine companies are exempted) may entail a fine or revocation of the corporate license in Virginia, or both. A district court of three judges, convened under § 266 of the Judicial Code as amended, 28 U.S.C. § 380, 28 U.S.C.A. § 380, dismissed appellants' bill on the basis of elaborate findings of fact and conclusions of law, set forth in an opinion by Circuit Judge Soper. 29 F.Supp. 71. From this decree the case comes here on appeal under § 238 of the Judicial Code as amended, 28 U.S.C. § 345, 28 U.S.C.A. § 345.

The bill was brought by foreign corporations authorized to do casualty and surety business in Virginia, and by some of their salaried employees. It is their claim that the statute deprives them of rights protected by the Fourteenth Amendment of the Constitution. The exact nature of these claims will appear more clearly in the setting of the illuminating findings below which may here be abbreviated.

The "production" of insurance—"production" being insurance jargon for obtaining business—is, in the main, carried on by two groups, agents and brokers. Though both are paid by commission, the different ways in which the two groups perform their functions have important practical consequences in the conduct of the insurance business, and hence in its regulation. The agent is tied to his company. But his ability to "produce" business depends upon the confidence of the community in him. He must therefore cultivate the good will and sense of dependence of his clients. He may finance the payment of premiums; he frequently assists in the filing and prosecution of claims; he acts as mediator between insurer and assured in the diverse situations which arise. The broker, on the other hand, is an independent middleman, not tied to a particular company. He meets more specially the needs of large customers, using their concentrated bargaining power to obtain the most favorable terms from competing companies. His activities, being largely confined to the big commercial centers, take place mostly outside Virginia.

A policy, whether "produced" by broker or agent, must be "serviced"—an insurance term for assistance rendered a customer in minimizing his risks. To this end the companies exert themselves directly, but the "producer" may render additional service. Only to a limited extent can risks be minimized at long range; local activity is essential. When the contract is "produced" by a non-resident broker the "servicing" function is normally performed by the company exclusively. When the "producer" is a resident agent the case is ordinarily otherwise.

For this, as well as for other reasons, it is obvious that non-resident brokers prefer to negotiate their contracts covering Virginia risks with companies authorized to do business in that Commonwealth.

These basic elements in the insurance business attain special significance in the case of enterprises operating not only in Virginia but in other states as well. For them the brokerage system offers the attractions of large-scale production. Through what is known as a master or "hotchpotch" policy, the assured may obtain a cheaper rate by pooling all his risks, whether in or out of Virginia. This wholesale insurance may furnish not only a reduced rate but a reduced commission to the customer. These are advantages which naturally draw the Virginia business of interstate enterprises away from local agents in Virginia to the great insurance centers.

In effecting the cost of these master policies, say the appellants, Virginia is intruding upon business transactions beyond its borders. Not only is a licensed company forbidden to write insurance except through a resident agent, but the agent cannot retain less than one-half of the customary commission allowed on such a contract for what may, so far as the requirements of the law are concerned, be no more than the perfunctory service of countersigning the policy.

But the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. *Alaska Packers Ass'n v. Industrial Accident Comm'n.*, 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044; *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193, 112 A.L.R. 293. Compare *Equitable Life Assur. Society v. Pennsylvania*, 238 U.S. 143, 35 S.Ct. 829, 59 L.Ed. 1239. It is equally immaterial that such state action may run counter to the economic wisdom either of Adam Smith or of J. Maynard Keynes, or may be ultimately mischievous even from the point of view of avowed state policy. Our inquiry must be much narrower. It is whether Virginia has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere. Compare *Wallace v. Hines*, 253 U.S. 66, 69, 40 S.Ct. 435, 436, 64 L.Ed. 782.

Virginia has not sought to prohibit the making of contracts beyond her borders. She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia, and Virginia's regulation of it.

A network of legislation controls the surety and casualty business in Virginia. Insolvent companies may not engage in it. Virginia Code, § 4180. Neither companies nor agents may give rebates. § 4222(c). Rates for workmen's compensation, automobile liability and surety contracts are determined by its Corporation Commission. §§ 1887(75), 4326a1, 4350(3). The difficulty of enforcing these regulations, so the District Court found, may be increased if policies covering Virginia risks are "produced" without participation by responsible local agents. Rebates evading local restriction may be granted under cover of business done outside the state. Contrariwise, if resident Virginia agents are made necessary conduits for insurance on Virginia risks now included in master policies, the state may have better means of acquiring accurate information for the effectuation of measures which it deems protective of its interests.

It is claimed that the requirement that not less than one-half of the customary commission be retained by the resident agent is a bald exaction for what may be no more than the perfunctory service of countersigning policies. The short answer to this is that the state may rely on this exaction as a mode of assuring the active use of resident agents for procuring and "servicing" policies covering Virginia risks. These functions, when adequately performed, benefit not only the company, the producer, and the assured. By minimizing the risks of casualty and loss, they redound in a pervasive way to the benefit of the community. At least Virginia may so have believed. And she may also have concluded that an agency system, such as this legislation was designed to promote, is better calculated to further these desirable ends than other modes of "production." When these beliefs are emphasized by legislation embodying similar notions of policy in a dozen states, it would savor of intolerance for us to suggest that a legislature could not constitutionally entertain the views which the legislation adopts. Compare *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 537, 42 S.Ct. 516, 520, 66 L.Ed. 1044, 27 A.L.R. 27.

The present case, therefore, is wholly unlike those instances in which a "so-called right is used as part of a scheme to accomplish a forbidden result." *Fidelity & Deposit Co. v. Tafoya*, 270

U.S. 426, 434, 46 S.Ct. 331, 332, 70 L.Ed. 664. For it is clear that Virginia has a definable interest in the contracts she seeks to regulate and that what she has done is very different from the imposition of conditions upon appellants' privilege of engaging in local business which would bring within the orbit of state power matters unrelated to any local interests. It is not our province to measure the social advantage to Virginia of regulating the conduct of insurance companies within her borders insofar as it affects Virginia risks. Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition. The state may fix insurance rates, *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A.1915C, 1189; it may regulate the compensation of agents, *O'Gorman & Young v. Hartford Ins. Co.*, 282 U.S. 251, 51 S.Ct. 130, 75 L.Ed. 324, 72 A.L.R. 1163; it may curtail drastically the area of free contract, *National Union Fire Ins. Co. v. Wanberg*, 260 U.S. 71, 43 S.Ct. 32, 67 L.Ed. 136. States have controlled the expenses of insurance companies, *New York Insurance Law, Consolidated Laws of New York*, c. 28, § 244, and *Wisconsin Statutes*, § 201.21; and see *Report of Joint (Armstrong) Insurance Investigation Committee (N.Y.)* pp. 403-418 (1906). They have also promoted insurance through savings banks; see *Berman, The Massachusetts System of Savings Bank Life Insurance*, Bulletin No. 615, U. S. Bureau of Labor Statistics, and *New York Laws of 1938*, c. 471. In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business, just as it can operate warehouses, flour mills, and other business ventures, *Green v. Frazier*, 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878, or might take "the whole business of banking under its control," *Noble State Bank v. Haskell*, 219 U.S. 104, 113, 31 S.Ct. 186, 188, 55 L.Ed. 112, 32 L.R.A.,N.S., 1062, *Ann.Cas.*1912A, 487. If the state, as to local risks, could thus preempt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against its local hazards. *LaTourette v. McMaster*, 248 U.S. 465, 39 S.Ct. 160, 63 L.Ed. 362. All these are questions of policy not for us to judge. For it can never be emphasized too much that one's own opinion as to the wisdom of a law must be wholly excluded when one is doing one's judicial duty. The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control.

In reaching this conclusion we have been duly mindful of the cases urged upon us by appellants. In *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832, apart from the doubts that have been cast upon the opinion in that case, the state attempted to penalize the making of contracts by its residents outside its borders with companies which had never subjected themselves to local control. Thus the statute was thought to be directed not at the regulation of insurance within the state, but at the making of contracts without. This was followed in *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 43 S.Ct. 125, 67 L.Ed. 297; but see the refined distinctions drawn in *Compania General de Tabacos v. Collector*, 275 U.S. 87, 48 S.Ct. 100, 72 L.Ed. 177. In *Fidelity & Deposit Co. v. Tafoya*, supra, the Court found that New Mexico had exceeded its power by forbidding "the payment of any emolument of any nature to any [non-resident] for the obtaining, placing or writing of any policy covering risks in New Mexico". The Court was of opinion that this statute went "beyond any legitimate interest of the State \* \* \*," *Id.*, 270 U.S. at page 435, 46 S.Ct. at page 332, 70 L.Ed. 664, but carefully withheld its judgment as to the validity of a later New Mexico statute not unlike the Virginia law here under review:

The decree must be affirmed.

Mr. Justice ROBERTS dissented in an opinion concurred in by Chief Justice HUGHES and Justice McREYNOLDS.

#### NOTE

1. The doctrine of the reported case has been extended to state legislation under which the local agent was required to be paid and to retain the full commission, *Holmes v. Springfield Fire & Marine Ins. Co.*, 311 U.S. 606, 61 S.Ct. 19, 85 L.Ed. 384 (1941).

2. Due process prevents a state from prohibiting its residents from entering without the state into contracts with insurance companies not authorized to do business within it if the contract is not to be performed within it, and the fact that it covers risks within the state is not deemed to make it one requiring performance within it; *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 43 S.Ct. 125, 67 L.Ed. 297 (1922). See Note, *State Regulation of Foreign Made Contracts*, 41 Harv.L.Rev. 390 (1928); N. Greene, *The Allgeyer Case as a Constitutional Embrasure of Territoriality*, 2 St. Johns L.Rev. 22 (1927).

3. The extent to which due process restricts a state's power to affect contracts made without it is considered in *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 38 S.Ct. 337, 62 L.Ed. 772 (1918); *Home Ins. Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930);

Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 54 S.Ct. 634, 78 L.Ed. 1178 (1934); Connecticut Mutual Life Ins. Co. v. Moore, 333 U.S. 541, 68 S.Ct. 682, 92 L.Ed. — (1948).

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### ENGEL v. O'MALLEY.

Supreme Court of the United States, 1911. 219 U.S. 128, 31 S.Ct. 190, 55 L.Ed. 128.

Mr. Justice HOLMES delivered the opinion of the court:

This is a bill in equity to prevent the carrying out of chapter 348 of the Laws of New York for 1910, which forbids individuals or partnerships to engage in the business of receiving deposits of money for safe-keeping, or for the purpose of transmission to another, or for any other purpose, without a license from the comptroller. The requirements for obtaining the license, so far as they affect the plaintiff, are that the applicant shall deposit \$10,000 with the comptroller, and present a bond with a penalty of not more than \$50,000 or less than \$10,000, to be fixed by the comptroller, conditioned upon the faithful performance of the duties undertaken. After notice shall have been posted for two weeks, the comptroller may approve or disapprove the application, in his discretion, and licensees are to pay a fee of \$50. § 25. The license is revocable at all times by the comptroller for cause shown. § 26. Carrying on the business specified, or using the word "banking" or "banker" on signs, letter heads, or advertisements in connection with any business, without a license, is made a misdemeanor. § 27. The foregoing provisions do not apply to any corporation or "individual banker" authorized to do business under the banking law, or to national banks; to any hotel keeper who shall receive money for safe-keeping from a guest; to any express or telegraph company receiving money for transmission; to individuals or partnerships where the average amount of each sum received on deposit or for transmission in the ordinary course of business shall have been not less than \$500 during the fiscal year preceding an affidavit to that effect; or, finally, to any individual or partnership filing a bond approved by the comptroller for \$100,000 when the business is in a city having a million inhabitants, or, if elsewhere, for \$50,000; or money or securities that the comptroller approves. § 29d.

The plaintiff alleges that he is a citizen of the United States, and has been engaged in the business specified in the statute for twenty years; that by good reputation and considerable expenditure he has made his business of great value, and that it chiefly consists in receiving deposits in very small sums from time to time until they reach an amount sufficient to be sent to other

states and mainly to foreign countries. The plaintiff further alleges that he has not the means that would enable him to make the deposit and give the bond required, and that the enforcement of the law against him will compel him to close. He avers that the statute is unconstitutional as against him under the 14th Amendment, U.S.C.A.Const. amend. 14, and under the commerce clause of the Constitution of the United States. Article 1, § 8, U.S.C.A.Const. art. 1, § 8. The bill was demurred to and the demurrer was sustained by the circuit court.

The first objection urged by the plaintiff in argument is to a requirement that we have not mentioned,—that the applicant must have been continuously for five years immediately preceding his application a resident of the United States. As the plaintiff alleges that he satisfies this requirement, he has nothing to complain of. And therefore, without intimating any doubt as to the validity of the clause, we pass at once to the matters in which he is concerned. *Southern R. Co. v. King*, 217 U.S. 524, 534, 30 S.Ct. 594, 54 L.Ed. 868, 871. As a preliminary to his argument, the plaintiff denies that he is in any sense a banker, and even goes so far as to treat the receipt of money for safe-keeping or transmission within the meaning of the act as a case of bailment, in which the very coins received must be returned or sent on. Of course, this is not a true construction of the statute, as is sufficiently indicated by the title "Private Banking." The receipt of money by a bank, although it only creates a debt, is in a popular sense the receipt of money for safe-keeping, since the depositor can draw it out again at such time and in such sums as he chooses. It is safe to assume that the transmission of money contemplated very generally is accomplished by a draft, and practically never by sending on the identical currency received. One form, at least, of the business aimed at, and, on the face of the bill, that carried on by the plaintiff, is a branch of the banking business. Furthermore, it is a business largely done with poor and ignorant immigrants, especially on their first arrival here.

We presume that the money deposited with the plaintiff is not drawn upon by checks, so that a part of the argument in *Noble State Bank v. Haskell*, just decided, 219 U.S. 104, 31 S.Ct. 186, 55 L.Ed. 112, 32 L.R.A.,N.S., 1062, Ann.Cas.1912A, 487, may not apply. On the other hand, experience has shown that the protection of such depositors against fraud, which is the purpose running through the statute, is especially needed by at least that class of them with whom the persons hit by the statute largely deal. The case cited establishes that the state may regulate that business, and may take strong measures to render it secure. It also establishes that the plaintiff has no such constitutional right to carry it on at will as to raise him above state laws not mani-

festly unfit to accomplish the supposed end, greatly in excess of the need, or arbitrary and capricious in discrimination. The quasi paternal relations shown in argument and by documents to exist between those following the plaintiff's calling and newly-arrived immigrants justifies a supervision more paternal than is needed in ordinary affairs. Whether the court thinks them wise or not, such laws are within the scope of the discretion which belongs to legislatures, and which it is usual for them to exert.

This appeal seems to have been taken upon the notion that the plaintiff had a business which, under the 14th Amendment, the state could not touch. But although cut off from that broad proposition, his counsel presents other more specific objections to the act with earnestness and force. It is said that even if the plaintiff could furnish the money and bond required, the comptroller might refuse a license upon his arbitrary whim. No guides are given in § 25 for the discretion that he is to exercise, and a provision in § 29e that nothing in the article shall be construed to require the comptroller to make any inquiry as to the solvency of any applicant is thought to exclude solvency as the test, and to leave the matter at sea. We do not so understand the purpose and purport of § 29e, and should suppose that the discretion to be exercised in the refusal to grant the license under § 25 was similar to that exercised under § 26 in revoking one; and that in each case the comptroller was expected to act for cause. But the nature and extent of the remedy, if any, for a breach of duty on his part, we think it unnecessary to consider; for the power of the state to make the pursuit of a calling dependent upon obtaining a license is well established, where safety seems to require it, and what we have said before sufficiently indicates that this calling is one to which the requirement may be attached. See *Gundling v. Chicago*, 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725; *New York ex rel. Lieberman v. Van de Carr*, 199 U.S. 552, 26 S.Ct. 144, 50 L.Ed. 305.

Again, it is argued that the statute makes unconstitutional discriminations by excepting the classes mentioned in § 29d above, especially those in whose business the average amount of each sum received is not less than \$500, and those who give a bond of \$100,000 or \$50,000. But the former of these exceptions has the manifest purpose to confine the law as nearly as may be to the class thought by the legislature to need protection, and the latter merely substitutes a different form of security, as it well may. "Legislation which regulates business may well make distinctions depend upon the degree of evil." *Heath & M. Mfg. Co. v. Worst*, 207 U.S. 338, 355, 356, 28 S.Ct. 114, 52 L.Ed. 236, 244. It is true, no doubt, that where size is not an index to an admitted evil, the law cannot discriminate between the great and small. But in this

case size is an index. Where the average amount of each sum received is not less than \$500, we know that we have not before us the class of ignorant and helpless depositors, largely foreign, whom the law seeks to protect. See *Musco v. United Surety Co.*, 196 N.Y. 459, 465, 90 N.E. 171, 134 Am.St.Rep. 851; *McLean v. Arkansas*, 211 U.S. 539, 551, 29 S.Ct. 206, 53 L.Ed. 315, 321.

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Decree affirmed.

### NOTE

1. A state may adopt an optional rather than a compulsory system of regulation, and is not required by the equal protection clause to offer to those not belonging to the group sought to be regulated the advantages on which it relies to induce acceptance of the regulatory system; *Assaria State Bank v. Dolley*, 219 U.S. 121, 31 S.Ct. 189, 55 L.Ed. 123 (1911); *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 35 S.Ct. 167, 59 L.Ed. 364 (1915).

2. States frequently require those wishing to practice professions within them to procure a license before being permitted to do so. The due process clause is not violated if the terms on which the license is obtainable are reasonably adapted to protecting the public interests affected by the practice of such professions; see *Dent v. West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889); *Douglas v. Noble*, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590 (1923); *Graves v. Minnesota*, 272 U.S. 425, 47 S.Ct. 122, 71 L.Ed. 331 (1926).

3. The extent to which due process prevents a state from restricting the right to engage in certain businesses is considered in *Noble State Bank v. Haskell*, 219 U.S. 104, 31 S.Ct. 186, 55 L.Ed. 112 (1911) (holding valid legislation restricting banking to corporations); *L. K. Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928) (holding invalid legislation requiring that every pharmacy or drug store be owned by a licensed pharmacist, and that, if owned by a partnership or corporation, all partners or members should be licensed pharmacists).

4. Due process is not violated by state legislation prohibiting the manufacture of intoxicants within it, *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887); margin trading, *Otis v. Parker*, 187 U.S. 606, 23 S.Ct. 168, 47 L.Ed. 323 (1903); the sale of commodity futures, *Booth v. Illinois*, 184 U.S. 425, 22 S.Ct. 425, 46 L.Ed. 623 (1902); but is violated by prohibiting the operation of private employment agencies, *Adams v. Tanner*, 244 U.S. 590, 37 S.Ct. 662, 61 L.Ed. 1336 (1917) (Quere as to whether this case is still law). As to resort to prohibitory license fees as a method of prohibition, see *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 36 S.Ct. 370, 60 L.Ed. 679 (1915).

## NEW STATE ICE CO. v. LIEBMANN.

Supreme Court of the United States, 1932. 285 U.S. 262, 52 S.Ct. 371,  
76 L.Ed. 747.

Mr. Justice SUTHERLAND delivered the opinion of the Court. The New State Ice Company, engaged in the business of manufacturing, selling, and distributing ice under a license or permit duly issued by the Corporation Commission of Oklahoma, brought this suit against Liebmann in the federal District Court for the Western District of Oklahoma to enjoin him from manufacturing, selling, and distributing ice within Oklahoma City without first having obtained a like license or permit from the commission. The license or permit is required by an act of the Oklahoma Legislature, chapter 147, Session Laws 1925. That act declares that the manufacture, sale, and distribution of ice is a public business; that no one shall be permitted to manufacture, sell, or distribute ice within the state without first having secured a license for that purpose from the commission; that whoever shall engage in such business without obtaining the license shall be guilty of a misdemeanor, punishable by fine not to exceed \$25, each day's violation constituting a separate offense, and that by general order of the commission, a fine not to exceed \$500 may be imposed for each violation.

Section 3 of the act provides:

"That the Corporation Commission shall not issue license to any persons, firm or corporation for the manufacture, sale and distribution of ice, or either of them, within this State, except upon a hearing had by said Commission at which said hearing, competent testimony and proof shall be presented showing the necessity for the manufacture, sale or distribution of ice, or either of them, at the point, community or place desired. If the facts proved at said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person, firm or corporation already licensed by said Commission at said point, community or place, are sufficient to meet the public needs therein, the said Corporation Commission may refuse and deny the applicant [application] for said license. In addition to said authority, the said Commission shall have the right to take into consideration the responsibility, reliability, qualifications and capacity of the person, firm or corporation applying for said license and of the person, firm or corporation already licensed in said place or community, as to afford all reasonable facilities, conveniences and services to the public and shall have the power and authority to require such facilities and services to be afforded the public;

provided, that nothing herein shall operate to prevent the licensing of any person, firm or corporation now engaged in the manufacture, sale and distribution of ice, or either of them, in any town, city or community of this State, whose license shall be granted and issued by said Commission upon application of such person, firm or corporation and payment of license fee."

The portion of the section immediately in question here is that which forbids the commission to issue a license to any applicant except upon proof of the necessity for a supply of ice at the place where it is sought to establish the business, and which authorizes a denial of the application where the existing licensed facilities "are sufficient to meet the public needs therein." The District Court dismissed the bill of complaint for want of equity, on the ground that the manufacture and sale of ice is a private business which may not be subjected to the foregoing regulation. 42 F.2d 913. The Court of Appeals affirmed. 52 F.2d 349.

It must be conceded that all businesses are subject to some measure of public regulation. And that the business of manufacturing, selling, or distributing ice, like that of the grocer, the dairyman, the butcher, or the baker, may be subjected to appropriate regulations in the interest of the public health cannot be doubted; but the question here is whether the business is so charged with a public use as to justify the particular restriction above stated. If this legislative restriction be within the constitutional power of the state Legislature, it follows that the license or permit, issued to appellant, constitutes a franchise, to which a court of equity will afford protection against one who seeks to carry on the same business without obtaining from the commission a license or permit to do so. *Frost v. Corporation Commission*, 278 U.S. 515, 519-521, 49 S.Ct. 235, 73 L.Ed. 483. In that view, engagement in the business is a privilege to be exercised only in virtue of a public grant, and not a common right to be exercised independently (*Id.*) by any competent person conformably to reasonable regulations equally applicable to all who choose to engage therein.

The *Frost Case* is relied on here. That case dealt with the business of operating a cotton gin. It was conceded that this was a business clothed with a public interest, and that the statute requiring a showing of public necessity as a condition precedent to the issue of a permit was valid. But the conditions which warranted the concession there are wholly wanting here. It long has been recognized that mills for the grinding of grain or performing similar services for all comers are devoted to a public use and subject to public control, whether they be operated by direct authority of the state or entirely upon individual initiative. At a very early period a majority of the states had adopted general acts authorizing the taking and flowage, in invitum, of lands

for their erection and maintenance. In passing these acts, the attention of the Legislatures no doubt was directed principally to grist mills; but some of the acts, either in precise terms or in their application, were extended to other kinds of mills. *Head v. Amoskeag Manufacturing Co.*, 113 U.S. 9, 16-19, 5 S.Ct. 441, 28 L.Ed. 889; *State v. Edwards*, 86 Me. 102, 104-106, 29 A. 947, 25 L.R.A. 504, 41 Am.St.Rep. 528. The mills were usually operated by the use of water power, but this method of operation has been said not to be essential. *State v. Edwards*, *supra*, 86 Me. at page 106, 29 A. 947, 25 L.R.A. 504, 41 Am.St.Rep. 528. It was open to the proprietor of a mill to maintain it as a private mill for grinding his own grain, and thus free from legislative control; but if the proprietor assumed to serve the general public he thereby dedicated his mill to the public use and subjected it to such legislative control as was appropriate to that status. In such cases the mills were regarded as so necessary to the existence of the communities which they served as to justify the government in fostering and maintaining them, and imposing limitations upon their operation for the protection of the public. *Id.*

In *Chickasha Cotton Oil Co. v. Cotton County Gin Co.* (C.C.A.) 40 F.2d 846, 74 A.L.R. 1070, three Circuit Judges passed upon the constitutionality of the Oklahoma Cotton Ginning Act. 17 Okl.St.Ann. § 41 et seq. Opinions were delivered *seriatim*, all to the effect, but for varying reasons, that the business of operating cotton gins in Oklahoma was clothed with a public interest. One of the judges thought that the rule in respect of grist mills should apply by analogy, on the ground of the similarity of service. The rule that mills whose services are open to all comers are clothed with a public interest was formulated in the light, and upon the basis, of historical usage, which had survived the limitations that otherwise might be imposed by the due process clause of the Fourteenth Amendment. While the cotton gin has no such background of ancient usage, and, as the opinion by Judge Phillips points out, there is always danger of our being led afieled by relying overmuch upon analogies, the analogy here is not without helpful significance. \* \* \*

We have thus, with some particularity, discussed the circumstances which, so far as the state of Oklahoma is concerned, afford ground for sustaining the legislative pronouncement that the business of operating cotton gins is charged with a public use, in order to put them in contrast with the completely unlike circumstances which attend the business of manufacturing, selling, and distributing ice. Here we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity of the entire state in large measure depends. It is a busi-

ness as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. It may be quite true that in Oklahoma ice is, not only an article of prime necessity, but indispensable; but certainly not more so than food or clothing or the shelter of a home. And this court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use; and that the same is true in respect of the business of renting houses and apartments, except as to temporary measures to tide over grave emergencies. See *Tyson & Bro.-United Ticket Officers v. Banton*, *supra*, 273 U. S. 437, 438, 47 S.Ct. 426, 71 L.Ed. 718, 58 A.L.R. 1236, and cases cited.

It has been said that the manufacture of ice requires an expensive plant beyond the means of the average citizen, and that, since the use of ice is indispensable, patronage of the producer by the consumer is unavoidable. The same might, however, be said in respect of other articles clearly beyond the reach of a restriction like that here under review. But, for the moment conceding the materiality of the statement, it is not now true, whatever may have been the fact in the past. We know, since it is common knowledge, that today, to say nothing of other means, wherever electricity or gas is available (and one or the other is available in practically every part of the country), any one for a comparatively moderate outlay may have set up in his kitchen an appliance by means of which he may manufacture ice for himself. Under such circumstances it hardly will do to say that people generally are at the mercy of the manufacturer, seller, and distributor of ice for ordinary needs. Moreover, the practical tendency of the restriction, as the trial court suggested in the present case, is to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public.

Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment, U.S.C.A.Const. Amend. 14. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, "under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnec-

essary restrictions upon them." *Burns Baking Co. v. Bryan*, 264 U.S. 504, 513, 44 S.Ct. 412, 413, 68 L.Ed. 813, 32 A.L.R. 661, and authorities cited; *Liggett Co. v. Baldridge*, 278 U.S. 105, 113, 49 S.Ct. 57, 73 L.Ed. 204.

Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice. It claims to be endowed with state authority to achieve this exclusion. There is no question now before us of any regulation by the state to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed. We are not able to see anything peculiar in the business here in question which distinguishes it from ordinary manufacture and production. It is said to be recent; but it is the character of the business and not the date when it began that is determinative. It is not the case of a natural monopoly, or of an enterprise in its nature dependent upon the grant of public privileges. The particular requirement before us was evidently not imposed to prevent a practical monopoly of the business, since its tendency is quite to the contrary. Nor is it a case of the protection of natural resources. There is nothing in the product that we can perceive on which to rest a distinction, in respect of this attempted control, from other products in common use which enter into free competition, subject, of course, to reasonable regulations prescribed for the protection of the public and applied with appropriate impartiality.

And it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that amendment merely by calling them experimental. It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the Federal Constitution. The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments. This principle has been applied by this court in many cases. \* \* \*

In the case last cited the theory of experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press. The opportunity to apply one's labor and skill in an ordinary occupation with proper regard for all reasonable regulations is no less entitled to protection.

Decree affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

[Messrs. Justices BRANDEIS and STONE dissented.]

#### NOTE

1. It has never been held violative of the due process clause to require certificates of convenience and necessity in the field of public utilities. However, it has been held violative of the equal protection clause to require such a certificate of one group while exempting therefrom competitors of the former, the competitors being treated as also engaged in business for profit though organized as co-operatives; *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929).

2. It has been held not to violate the due process clause to require such a certificate of contract carriers by truck because it was deemed a reasonable method for conserving the state's highway system; *Stephenson v. Binford*, 287 U.S. 251, 53 S.Ct. 181, 77 L.Ed. 288 (1932). But it has been held to violate that clause for a state to condition the grant of a permit to use its highways for business purposes by a private carrier on such carrier's assumption of the duties of a public or common carrier; *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570, 45 S.Ct. 191, 69 L.Ed. 445 (1925); *Frost v. Railroad Commission of California*, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101 (1926). See *L. Brown and S. N. Scott, Regulation of Contract Motor Carriers Under the Constitution*, 44 Harv.L.Rev. 530 (1931).

3. Quere whether the expanded theory of the legitimate field of price control, and of what constitutes a business affected with a public interest, developed in *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934), has impliedly overruled the reported case. For an argument in favor of permitting states to require such a certificate wherever excessive competition threatens public injury, see the dissenting opinion of Mr. Justice Brandeis in the reported case.

KOTCH v. BOARD OF RIVER PORT PILOT COMMISSIONERS  
OF PORT OF NEW ORLEANS.

Supreme Court of the United States, 1947.  
330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093.

Mr. Justice BLACK delivered the opinion of the Court.

Louisiana statutes provide in general that all seagoing vessels moving between New Orleans and foreign ports must be navigated through the Mississippi River approaches to the port of New Orleans and within it, exclusively by pilots who are State Officers. New State pilots are appointed by the governor only upon certification of a State Board of River Pilot Commissioners, themselves pilots. Only those who have served a six month apprenticeship under incumbent pilots and who possess other specific qualifications may be certified to the governor by the board. Appellants here have had at least fifteen years experience in the river, the port, and elsewhere, as pilots of vessels whose pilotage was not governed by the State law in question. Although they possess all the statutory qualifications except that they have not served the requisite six months apprenticeship under Louisiana officer pilots, they have been denied appointment as State pilots. Seeking relief in a Louisiana state court, they alleged that the incumbent pilots, having unfettered discretion under the law in the selection of apprentices, had selected with occasional exception, only the relatives and friends of incumbents; that the selections were made by electing prospective apprentices into the pilots' association, which the pilots have formed by authority of State law; that since "membership \* \* \* is closed to all except those having the favor of the pilots" the result is that only their relatives and friends have and can become State pilots. The Supreme Court of Louisiana has held that the pilotage law so administered does not violate the equal protection clause of the Fourteenth Amendment, 209 La. 737, 25 So.2d 527. The case is here on appeal from that decision under 28 U.S.C. § 344(a), 28 U.S.C.A. § 344(a).

The constitutional command for a state to afford "equal protection of the laws" sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task. A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. See e. g., *Tigner v. State of Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124, 130 A.L.R. 1321.

Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be. For it is axiomatic that the consequence of regulating by setting apart a classified group is that those in it will be subject to some restrictions or receive certain advantages that do not apply to other groups or to all the public. *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U.S. 96, 106, 19 S.Ct. 609, 613, 43 L.Ed. 909. This selective application of a regulation is discrimination in the broad sense, but it may or may not deny equal protection of the laws. Clearly, it might offend that constitutional safeguard if it rested on grounds wholly irrelevant to achievement of the regulation's objectives. An example would be a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having no rational relation to the regulated activities. See *American Sugar Refining Co. v. State of Louisiana*, 179 U.S. 89, 92, 21 S.Ct. 43, 45, 45 L.Ed. 102.

The case of *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, relied on by appellants, is an illustration of a type of discrimination which is incompatible with any fair conception of equal protection of the laws. *Yick Wo* was denied the right to engage in an occupation supposedly open to all who could conduct their business in accordance with the law's requirements. He could meet these requirements, but was denied the right to do so solely because he was Chinese. And it made no difference that under the law as written *Yick Wo* would have enjoyed the same protection as all others. Its unequal application to *Yick Wo* was enough to condemn it. But *Yick Wo's* case, as other cases have demonstrated, was tested by the language of the law there considered and the administration there shown.

\* \* \* So here, we must consider the relationship of the method of appointing pilots to the broad objectives of the entire Louisiana pilotage law. \* \* \* In so doing we must view the appointment system in the context of the historical evolution of the laws and institution of pilotage in Louisiana and elsewhere. \* \* \* And an important factor in our consideration is that this case tests the right and power of a state to select its own agents and officers. \* \* \*

Studies of the long history of pilotage reveal that it is a unique institution and must be judged as such. In order to avoid invisible hazards, vessels approaching and leaving ports must be conducted from and to open waters by persons intimately familiar with the local waters. The pilot's job generally requires that he go outside the harbor's entrance in a

small boat to meet incoming ships, board them and direct their course from open waters to the port. The same service is performed for vessels leaving the port. Pilots are thus indispensable cogs in the transportation system of every maritime economy. Their work prevents traffic congestion and accidents which would impair navigation in and to the ports. It affects the safety of lives and cargo, the cost and time expended in port calls, and in some measure, the competitive attractiveness of particular ports. Thus, for the same reasons that governments of most maritime communities have subsidized, regulated, or have themselves operated docks and other harbor facilities and sought to improve the approaches to their ports, they have closely regulated and often operated their ports' pilotage system.

The history and practice of pilotage demonstrate that, although inextricably geared to a complex commercial economy, it is also a highly personalized calling. A pilot does not require a formalized technical education so much as a detailed and extremely intimate, almost intuitive, knowledge of the weather, waterways and conformation of the harbor or river which he serves. This seems to be particularly true of the approaches to New Orleans through the treacherous and shifting channel of the Mississippi River. Moreover, harbor entrances where pilots can most conveniently make their homes and still be close to places where they board incoming and leave outgoing ships are usually some distance from the port cities they serve. These "pilot towns" have begun, and generally exist today, as small communities of pilots perhaps near, but usually distinct from the port cities. In these communities young men have an opportunity to acquire special knowledge of the weather and water hazards of the locality and seem to grow up with ambitions to become pilots in the traditions of their fathers, relatives, and neighbors. We are asked, in effect, to say that Louisiana is without constitutional authority to conclude that apprenticeship under persons specially interested in a pilot's future is the best way to fit him for duty as a pilot officer in the service of the State.

The States have had full power to regulate pilotage of certain kinds of vessels since 1789 when the first Congress decided that then existing state pilot laws were satisfactory and made federal regulation unnecessary. 1 Stat. 53, 54 (1789), 46 U.S.C. § 211, 46 U.S.C.A. § 211; *Olsen v. Smith*, 195 U.S. 332, 341, 25 S.Ct. 52, 53, 49 L.Ed. 224; *Anderson v. Pacific Coast S. S. Co.*, 225 U.S. 187, 32 S.Ct. 626, 56 L.Ed. 1047. Louisiana legislation has controlled the activities and appointment of pilots since

1805—even before the Territory was admitted as a State. The State pilotage system, as it has evolved since 1805, is typical of that which grew up in most seaboard states and in foreign countries. Since 1805 Louisiana pilots have been State officers whose work has been controlled by the State. The Act forbade all but a limited number of pilots appointed by the governor to serve in that capacity. The pilots so appointed were authorized to select their own deputies. But pilots, and through them, their deputies, were literally under the command of the master and the wardens of the port of New Orleans, appointed by the governor. The master and wardens were authorized to make rules governing the practices of pilots, specifically empowered to order pilots to their stations, and to fine them for disobedience to orders or rules. And the pilots were required to make official bond for faithful performance of their duty. Pilots' fees were fixed; ships coming to the Mississippi were required to pay pilotage whether they took on pilots or not. The pilots were authorized to organize an association whose membership they controlled in order "to enforce the legal regulations, and add to the efficiency of the service required thereby." Moreover, efficient and adequate service was sought to be insured by requiring the Board of Pilot Commissioners to report to the governor and authorizing him summarily to remove any pilot guilty of "neglect of duty, habitual intemperance, carelessness, incompetency, or any act of conduct \* \* \* showing" that he "ought to be removed." La.Act No. 113, § 20 (1857). These provisions have been carried over with some revision into the present comprehensive Louisiana pilotage law. 6 La.Gen.Stat., cc. 6, 8 (1939). Thus in Louisiana, as elsewhere, it seems to have been accepted at an early date that in pilotage, unlike other occupations, competition for appointment, for the opportunity to serve particular ships and for fees, adversely affects the public interest in pilotage.

It is within the framework of this longstanding pilotage regulation system that the practice has apparently existed of permitting pilots, if they choose, to select their relatives and friends as the only ones ultimately eligible for appointment as pilots by the governor. Many other states have established pilotage systems which make the selection of pilots on this basis possible. Thus it was noted thirty years ago in a Department of Commerce study of pilotage that membership of pilot associations "is limited to persons agreeable to those already members, generally relatives and friends of the pilots. Probably in pilotage more than in any other occupation in the United States the male members of a family follow the same work from generation to generation."

The practice of nepotism in appointing public servants has been a subject of controversy in this country throughout our history. Some states have adopted constitutional amendments or statutes, to prohibit it. These have reflected state policies to wipe out the practice. But Louisiana and most other states have adopted no such general policy. We can only assume that the Louisiana legislature weighed the obvious possibility of evil against whatever useful function a closely knit pilotage system may serve. Thus the advantages of early experience under friendly supervision in the locality of the pilot's training, the benefits to morale and esprit de corps which family and neighborly tradition might contribute, the close association in which pilots must work and live in their pilot communities and on the water, and the discipline and regulation which is imposed to assure the State competent pilot service after appointment, might have prompted the legislature to permit Louisiana pilot officers to select those with whom they would serve.

The number of people, as a practical matter, who can be pilots is very limited. No matter what system of selection is adopted, all but the few occasionally selected must of necessity be excluded. Cf. *Olsen v. Smith*, supra, 195 U.S. at pages 344, 345, 25 S.Ct. at pages 54, 55, 49 L.Ed. 224. We are aware of no decision of this Court holding that the Constitution requires a state governor, or subordinates responsible to him and removable by him for cause, to select state public servants by competitive tests or by any other particular method of selection. The object of the entire pilotage law, as we have pointed out, is to secure for the State and others interested the safest and most efficiently operated pilotage system practicable. We cannot say that the method adopted in Louisiana for the selection of pilots is unrelated to this objective. See *Olsen v. Smith*, supra; cf. *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 509, 510, 57 S.Ct. 868, 872, 873, 81 L.Ed. 1245, 109 A.L.R. 1327. We do not need to consider hypothetical questions concerning any similar system of selection which might conceivably be practiced in other professions or businesses regulated or operated by state governments. It is enough here that considering the entirely unique institution of pilotage in the light of its history in Louisiana, we cannot say that the practice appellants attack is the kind of discrimination which violates the equal protection clause of the Fourteenth Amendment.

Affirmed.

Mr. Justice RUTLEDGE dissented in an opinion concurred in by Justices REED, DOUGLAS and MURPHY.

## NOTE

A California statute barring aliens ineligible for federal citizenship from commercial fishing in offshore waters was held to violate the equal protection clause of the Fourteenth Amendment as applied to an alien Japanese. *Takahashi v. Fish & Game Commission*, — U.S. —, 68 S.Ct. 1138, 92 L.Ed. — (1948).

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NEBBIA v. NEW YORK.

Supreme Court of the United States, 1934. 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469.

Appeal from the County Court of Monroe County, New York.

Leo Nebbia was convicted for violating an order of the New York Milk Control Board fixing the selling price of milk, and the conviction having been affirmed by the Court of Appeals of New York, 262 N.Y. 259, 186 N.E. 694, he appeals.

Affirmed.

Mr. Justice ROBERTS delivered the opinion of the Court.

The Legislature of New York established by chapter 158 of the Laws of 1933, a Milk Control Board with power, among other things to "fix minimum and maximum \* \* \* retail prices to be charged by \* \* \* stores to consumers for consumption off the premises where sold." Agriculture and Markets Law N.Y.(Consol.Laws, c. 69) § 312. The board fixed nine cents as the price to be charged by a store for a quart of milk. Nebbia, the proprietor of a grocery store in Rochester, sold two quarts and a 5-cent loaf of bread for 18 cents; and was convicted for violating the board's order. At his trial he asserted the statute and order contravene the equal protection clause and the due process clause of the Fourteenth Amendment, U.S.C. A.Const. Amend. 14, and renewed the contention in successive appeals to the county court and the Court of Appeals. Both overruled his claim and affirmed the conviction.

The question for decision is whether the Federal Constitution prohibits a state from so fixing the selling price of milk. We first inquire as to the occasion for the legislation and its history.

During 1932 the prices received by farmers for milk were much below the cost of production. The decline in prices during 1931 and 1932 was much greater than that of prices generally. The situation of the families of dairy producers had become desperate and called for state aid similar to that afforded the unemployed, if conditions should not improve.

On March 10, 1932, the senate and assembly resolved, "That a joint Legislative committee is hereby created \* \* \* to investigate the causes of the decline of the price of milk to producers and the resultant effect of the low prices upon the dairy

industry and the future supply of milk to the cities of the State; to investigate the cost of distribution of milk and its relation to prices paid to milk producers, to the end that the consumer may be assured of an adequate supply of milk at a reasonable price, both to producer and consumer." The committee organized May 6, 1932, and its activities lasted nearly a year. It held 13 public hearings at which 254 witnesses testified and 2,350 typewritten pages of testimony were taken. Numerous exhibits were submitted. Under its direction an extensive research program was prosecuted by experts and official bodies and employees of the state and municipalities, which resulted in the assembling of much pertinent information. Detailed reports were received from over 100 distributors of milk, and these were collated and the information obtained analyzed. As a result of the study of this material a report covering 473 closely printed pages, embracing the conclusions and recommendations of the committee, was presented to the Legislature April 10, 1933. This document included detailed findings with copious references to the supporting evidence; appendices, outlining the nature and results of prior investigations of the milk industry of the state, briefs upon the legal questions involved, and forms of bills recommended for passage. The conscientious effort and thoroughness exhibited by the report lend weight to the committee's conclusions.

In part those conclusions are:

Milk is an essential item of diet. It cannot long be stored. It is an excellent medium for growth of bacteria. These facts necessitate safeguards in its production and handling for human consumption which greatly increase the cost of the business. Failure of producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination.

The production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people. Dairying yields fully one-half of the total income from all farm products. Dairy farm investment amounts to approximately \$1,000,000,000. Curtailment or destruction of the dairy industry would cause a serious economic loss to the people of the state.

In addition to the general price decline, other causes for the low price of milk include a periodic increase in the number of cows and in milk production, the prevalence of unfair and destructive trade practices in the distribution of milk, leading to a demoralization of prices in the metropolitan area and other markets, and the failure of transportation and distribution

charges to be reduced in proportion to the reduction in retail prices for milk and cream.

The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 per cent., because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk shed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i. e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations) can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price to his own and the producer's detriment.

Various remedies were suggested, amongst them united action by producers, the fixing of minimum prices for milk and cream by state authority, and the imposition of certain graded taxes on milk dealers proportioned so as to equalize the cost of milk and cream to all dealers and so remove the cause of price-cutting.

The Legislature adopted chapter 158 as a method of correcting the evils, which the report of the committee showed could not be expected to right themselves through the ordinary play of the forces of supply and demand, owing to the peculiar and uncontrollable factors affecting the industry. The provisions of the statute are summarized in the margin.

Section 312(e) on which the prosecution in the present case is founded, provides: "After the board shall have fixed prices to be charged or paid for milk in any form \* \* \* it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy

milk at any price less or more than such price, \* \* \* and no method or device shall be lawful whereby milk is bought or sold \* \* \* at a price less or more than such price \* \* \* whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise. \* \* \*

First. The appellant urges that the order of the Milk Control Board denies him the equal protection of the laws. It is shown that the order requires him, if he purchases his supply from a dealer, to pay 8 cents per quart and 5 cents per pint, and to resell at not less than 9 and 6, whereas the same dealer may buy his supply from a farmer at lower prices and deliver milk to consumers at 10 cents the quart and 6 cents the pint. We think the contention that the discrimination deprives the appellant of equal protection is not well founded. For aught that appears, the appellant purchased his supply of milk from a farmer as do distributors, or could have procured it from a farmer if he so desired. There is therefore no showing that the order placed him at a disadvantage, or in fact affected him adversely, and this alone is fatal to the claim of denial of equal protection. But if it were shown that the appellant is compelled to buy from a distributor, the difference in the retail price he is required to charge his customers, from that prescribed for sales by distributors is not on its face arbitrary or unreasonable, for there are obvious distinctions between the two sorts of merchants which may well justify a difference of treatment, if the Legislature possesses the power to control the prices to be charged for fluid milk. Compare *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89, 21 S.Ct. 43, 45 L.Ed. 102; *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 30 S.Ct. 578, 54 L.Ed. 883; *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527, 51 S.Ct. 540, 75 L.Ed. 1248, 73 A.L.R. 1464.

Second. The more serious question is whether, in the light of the conditions disclosed, the enforcement of section 312(e) denied the appellant the due process secured to him by the Fourteenth Amendment, U.S.C.A.Const. Amend. 14.

Save the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry. Legislation controlling it in the interest of the public health was adopted in 1862 and subsequent statutes, have been carried into the general codification known as the Ag-

riculture and Markets Law. A perusal of these statutes discloses that the milk industry has been progressively subjected to a larger measure of control. The producer or dairy farmer is in certain circumstances liable to have his herd quarantined against bovine tuberculosis; is limited in the importation of dairy cattle to those free from Bang's disease; is subject to rules governing the care and feeding of his cows and the care of the milk produced, the condition and surroundings of his barns and buildings used for production of milk, the utensils used, and the persons employed in milking (sections 46, 47, 55, 72-88). Proprietors of milk gathering stations or processing plants are subject to regulation (section 54), and persons in charge must operate under license and give bond to comply with the law and regulations; must keep records, pay promptly for milk purchased, abstain from false or misleading statements and from combinations to fix prices (sections 57, 57-a, 252). In addition there is a large volume of legislation intended to promote cleanliness and fair trade practices, affecting all who are engaged in the industry. The challenged amendment of 1933 carried regulation much farther than the prior enactments. Appellant insists that it went beyond the limits fixed by the Constitution.

Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. As Chief Justice Marshall said, speaking specifically of inspection laws, such laws form "a portion of that immense mass of legislation which embraces everything within the territory of a state, \* \* \* all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, \* \* \* are component parts of this mass." [Gibbons v. Ogden, 9 Wheat. 1, 203, 6 L.Ed. 23].

Justice Barbour said for this court: "\* \* \* it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated.

That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive." [City of New York v. Miln, 11 Pet. 102, 139, 9 L.Ed. 648].

And Chief Justice Taney said upon the same subject: "But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States." [Licence Cases, 5 How. 504, 583, 12 L.Ed. 256].

Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government, as shown by the quotations above given. These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

The Fifth Amendment, U.S.C.A.Const. amend. 5, in the field of federal activity, and the Fourteenth, U.S.C.A.Const. amend. 14, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for

one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power.

The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community. The state may control the use of property in various ways; may prohibit advertising bill boards except of a prescribed size and location, or their use for certain kinds of advertising; may in certain circumstances authorize encroachments by party walls in cities; may fix the height of buildings, the character of materials, and methods of construction, the adjoining area which must be left open, and may exclude from residential sections offensive trades, industries and structures likely injuriously to affect the public health or safety; or may establish zones within which certain types of buildings or businesses are permitted and others excluded. And although the Fourteenth Amendment extends protection to aliens as well as citizens, a state may for adequate reasons of policy exclude aliens altogether from the use and occupancy of land.

Laws passed for the suppression of immorality, in the interest of health, to secure fair trade practices, and to safeguard the interests of depositors in banks, have been found consistent with due process. These measures not only affected the use of private property, but also interfered with the right of private contract. Other instances are numerous where valid regulation has restricted the right of contract, while less directly affecting property rights.

The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency.

Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, by giving trade in-

ducements to purchasers, and by other forms of price discrimination. The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees. Moreover, the state or a municipality may itself enter into business in competition with private proprietors, and thus effectively although indirectly control the prices charged by them.

The milk industry in New York has been the subject of long-standing and drastic regulation in the public interest. The legislative investigation of 1932 was persuasive of the fact that for this and other reasons unrestricted competition aggravated existing evils and the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community. The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price cutting and reduced the income of the farmer below the cost of production. We do not understand the appellant to deny that in these circumstances the Legislature might reasonably consider further regulation and control desirable for protection of the industry and the consuming public. That body believed conditions could be improved by preventing destructive price-cutting by stores which, due to the flood of surplus milk, were able to buy at much lower prices than the larger distributors and to sell without incurring the delivery costs of the latter. In the order of which complaint is made the Milk Control Board fixed a price of 10 cents per quart for sales by a distributor to a consumer, and 9 cents by a store to a consumer, thus recognizing the lower costs of the store, and endeavoring to establish a differential which would be just to both. In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk.

But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden. His position is that the Fourteenth Amendment requires us to hold the challenged statute void for this reason alone. The argument

runs that the public control of rates or prices is per se unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or one whose owner relies on a public grant or franchise for the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly. The milk industry, it is said, possesses none of these characteristics, and, therefore, not being affected with a public interest, its charges may not be controlled by the state. Upon the soundness of this contention the appellant's case against the statute depends.

We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negated many years ago. *Munn v. Illinois*, 94 U.S. 113, 24 L. Ed. 77. The appellant's claim is, however, that this court, in there sustaining a statutory prescription of charges for storage by the proprietors of a grain elevator, limited permissible legislation of that type to businesses affected with a public interest, and he says no business is so affected except it have one or more of the characteristics he enumerates. But this is a misconception. *Munn* and *Scott* held no franchise from the state. They owned the property upon which their elevator was situated and conducted their business as private citizens. No doubt they felt at liberty to deal with whom they pleased and on such terms as they might deem just to themselves. Their enterprise could not fairly be called a monopoly, although it was referred to in the decision as a "virtual monopoly." This meant only that their elevator was strategically situated and that a large portion of the

public found it highly inconvenient to deal with others. This court concluded the circumstances justified the legislation as an exercise of the governmental right to control the business in the public interest; that is, as an exercise of the police power. It is true that the court cited a statement from Lord Hale's *De Portibus Maris*, to the effect that when private property is "affected with a public interest, it ceases to be *juris privati* only"; but the court proceeded at once to define what it understood by the expression, saying: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." Page 126 of 94 U. S. Thus understood, "affected with a public interest" is the equivalent of "subject to the exercise of the police power"; and it is plain that nothing more was intended by the expression. The court had been at pains to define that power (pages 124, 125 of 94 U.S.) ending its discussion in these words: "From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation."

In the further discussion of the principle it is said that when one devotes his property to a use, "in which the public has an interest," he in effect "grants to the public an interest in that use" and must submit to be controlled for the common good. The conclusion is that if *Munn* and *Scott* wished to avoid having their business regulated they should not have embarked their property in an industry which is subject to regulation in the public interest.

The true interpretation of the court's language is claimed to be that only property voluntarily devoted to a known public use is subject to regulation as to rates. But obviously *Munn* and *Scott* had not voluntarily dedicated their business to a public use. They intended only to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transactions or conferred any right of regulation. The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue.

In the same volume the court sustained regulation of railroad rates. After referring to the fact that railroads are carriers for hire, are incorporated as such, and given extraordinary powers

in order that they may better serve the public, it was said that they are engaged in employment "affecting the public interest," and therefore, under the doctrine of the *Munn Case*, subject to legislative control as to rates. And in another of the group of railroad cases then heard it was said that the property of railroads is "clothed with a public interest" which permits legislative limitation of the charges for its use. Plainly the activities of railroads, their charges and practices, so nearly touch the vital economic interests of society that the police power may be invoked to regulate their charges, and no additional formula of affectation or clothing with a public interest is needed to justify the regulation. And this is evidently true of all business units supplying transportation, light, heat, power and water to communities, irrespective of how they obtain their powers.

The touchstone of public interest in any business, its practices and charges, clearly is not the enjoyment of any franchise from the state, *Munn v. Illinois*, *supra*. Nor is it the enjoyment of a monopoly; for in *Brass v. North Dakota*, 153 U.S. 391, 14 S.Ct. 857, 38 L.Ed. 757, a similar control of prices of grain elevators was upheld in spite of overwhelming and uncontradicted proof that about six hundred grain elevators existed along the line of the Great Northern Railroad, in North Dakota; that at the very station where the defendant's elevator was located two others operated; and that the business was keenly competitive throughout the state.

In *German Alliance Insurance Co. v. Lewis*, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A.1915C, 1189, a statute fixing the amount of premiums for fire insurance was held not to deny due process. Though the business of the insurers depended on no franchise or grant from the state, and there was no threat of monopoly, two factors rendered the regulation reasonable. These were the almost universal need of insurance protection and the fact that while the insurers competed for the business, they all fixed their premiums for similar risks according to an agreed schedule of rates. The court was at pains to point out that it was impossible to lay down any sweeping and general classification of businesses as to which price-regulation could be adjudged arbitrary or the reverse.

Many other decisions show that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. The usury laws fix the price which may be exacted for the use of money, although no business more essentially private in character can be imagined than that of loaning one's personal funds. *Griffith v. Connecticut*, 218 U.S. 563, 31 S.Ct. 132, 54 L.Ed. 1151. Insurance agents' compensation may be regulated, though their contracts are private, be-

cause the business of insurance is considered one properly subject to public control. *O'Gorman & Young v. Hartford Ins. Co.*, 282 U.S. 251, 51 S.Ct. 130, 75 L.Ed. 324, 72 A.L.R. 1163. Statutes prescribing in the public interest the amounts to be charged by attorneys for prosecuting certain claims, a matter ordinarily one of personal and private nature, are not a deprivation of due process. *Frisbie v. United States*, 157 U.S. 160, 15 S.Ct. 586, 39 L.Ed. 657; *Capital Trust Co. v. Calhoun*, 250 U.S. 208, 39 S.Ct. 486, 63 L.Ed. 942; *Calhoun v. Massie*, 253 U.S. 170, 40 S.Ct. 474, 64 L.Ed. 843; *Newman v. Moyers*, 253 U.S. 182, 40 S.Ct. 478, 64 L.Ed. 849; *Yeiser v. Dysart*, 267 U.S. 540, 45 S.Ct. 399, 69 L.Ed. 775; *Margolin v. United States*, 269 U.S. 93, 46 S.Ct. 64, 70 L.Ed. 176. A stockyards corporation, "while not a common carrier, nor engaged in any distinctively public employment, is doing a work in which the public has an interest," and its charges may be controlled. *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 85, 22 S.Ct. 30, 46 L.Ed. 92. Private contract carriers, who do not operate under a franchise, and have no monopoly of the carriage of goods or passengers, may, since they use the highways to compete with railroads, be compelled to charge rates not lower than those of public carriers for corresponding services, if the state, in pursuance of a public policy to protect the latter, so determines. *Stephenson v. Binford*, 287 U.S. 251, 274, 53 S.Ct. 181, 77 L.Ed. 288, 87 A.L.R. 721.

It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 535, 43 S.Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280. The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest," and "clothed with a public use," have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its

aspects, including the prices to be charged for the products or commodities it sells.

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine." *Northern Securities Co. v. United States*, 193 U.S. 197, 337, 338, 24 S.Ct. 436, 457, 48 L.Ed. 679. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

The lawmaking bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the Legislature to be fair to those engaged in the industry and to the consuming

public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

Tested by these considerations we find no basis in the due process clause of the Fourteenth Amendment for condemning the provisions of the Agriculture and Markets Law here drawn into question.

The judgment is affirmed.

[Mr. Justice McREYNOLDS dissented in an opinion concurred in by Mr. Justice VAN DEVANTER, Mr. Justice SUTHERLAND, and Mr. Justice BUTLER.]

#### NOTE

1. For discussion of the principles and theories developed by the Supreme Court for defining the constitutional area of price control prior to, and as affected by, the reported case, see H. Rottschaefer, *The Field of Governmental Price Control*, 35 *Yale L.Jour.* 438 (1926); W. H. Hamilton, *Affectation With a Public Interest*, 39 *Yale L.Jour.* 1089 (1930); R. E. Hale, *The Constitution and the Price System: Some Reflections on Nebbia v. New York*, 34 *Col.L.Rev.* 401 (1934).

2. In *Olsen v. Nebraska*, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305 (1941), in which the Court overruled *Ribnik v. McBride*, 277 U.S. 350, 48 S.Ct. 545, 72 L.Ed. 913 (1928), the Court stated that "The drift away from *Ribnik v. Mc Bride* has been so great that it can no longer be deemed a controlling authority. \* \* \* These cases [the reference is to the price-fixing decisions subsequent to the *Ribnik Case*] represent more than scattered examples of constitutionally permissible price-fixing schemes. They represent in large measure a basic departure from the philosophy and approach of the majority in the *Ribnik Case*. \* \* \* In the final analysis, the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in the earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined." (244-247).

3. It should be noted that, whereas prior to the *Nebbia Case* price-fixing was used almost wholly to protect consumers by fixing maximum prices, that case and others of that era dealt with fixing minimum prices to protect the economic interests of producers. For discussion of extent to which the equal protection clause limits

governmental price-fixing, see *Borden Farms Product Co. v. Ten Eyck*, 297 U.S. 251, 56 S.Ct. 453, 80 L.Ed. 669 (1936); *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 56 S.Ct. 457, 80 L.Ed. 675 (1936).

4. The due process clause of the Fifth Amendment is not violated by federal price-fixing legislation; *U. S. v. Rock Royal Co-operative*, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940).

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## FEDERAL POWER COMMISSION v. HOPE NATURAL GAS CO.

Supreme Court of the United States, 1944.  
320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333.

Mr. Justice DOUGLAS delivered the opinion of the Court.

The primary issue in these cases concerns the validity under the Natural Gas Act of 1938, 52 Stat. 821, 15 U.S.C. § 717 et seq., 15 U.S.C.A. § 717 et seq., of a rate order issued by the Federal Power Commission reducing the rates chargeable by Hope Natural Gas Co., 44 P.U.R.,N.S., 1. On a petition for review of the order made pursuant to § 19(b) of the Act, the Circuit Court of Appeals set it aside, one judge dissenting. 4 Cir., 134 F.2d 287. The cases are here on petitions for writs of certiorari which we granted because of the public importance of the questions presented. *City of Cleveland v. Hope Natural Gas Co.*, 319 U.S. 735, 63 S.Ct. 1165.

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On May 26, 1942, the Commission entered its order and made its findings. Its order required Hope to decrease its future interstate rates so as to reflect a reduction, on an annual basis of not less than \$3,609,857 in operating revenues. And it established "just and reasonable" average rates per m.c.f. for each of the five customer companies. In response to the prayer of the City of Cleveland the Commission also made findings as to the lawfulness of past rates, although concededly it had no authority under the Act to fix past rates or to award reparations. 44 P. U.R.,N.S., at page 34. It found that the rates collected by Hope from East Ohio were unjust, unreasonable, excessive and therefore unlawful, by \$830,892 during 1939, \$3,219,551 during 1940, and \$2,815,789 on an annual basis since 1940. It further found that just, reasonable, and lawful rates for gas sold by Hope to East Ohio for resale for ultimate public consumption were those required to produce \$11,528,608 for 1939, \$11,507,185 for 1940 and \$11,910,947 annually since 1940.

The Commission established an interstate rate base of \$33,712,-526 which, it found, represented the "actual legitimate cost" of the company's interstate property less depletion and depreciation and plus unoperated acreage, working capital and future net capital additions. The Commission, beginning with book cost, made certain adjustments not necessary to relate here and found the "actual legitimate cost" of the plant in interstate service to be \$51,957,416, as of December 31, 1940. It deducted accrued depletion and depreciation, which it found to be \$22,328,016 on an "economic-service-life" basis. And it added \$1,392,021 for future net capital additions, \$566,105 for useful unoperated acreage, and \$2,125,000 for working capital. It used 1940 as a test year to estimate future revenues and expenses. It allowed over \$16,000,000 as annual operating expenses—about \$1,300,000 for taxes, \$1,460,000 for depletion and depreciation, \$600,000 for exploration and development costs, \$8,500,000 for gas purchased. The Commission allowed a net increase of \$421,160 over 1940 operating expenses, which amount was to take care of future increase in wages, in West Virginia property taxes, and in exploration and development costs. The total amount of deductions allowed from interstate revenues was \$13,495,584.

Hope introduced evidence from which it estimated reproduction cost of the property at \$97,000,000. It also presented a so-called trended "original cost" estimate which exceeded \$105,000,000. The latter was designed "to indicate what the original cost of the property would have been if 1938 material and labor prices had prevailed throughout the whole period of the piece-meal construction of the company's property since 1898." 44 P.U.R., N.S., at pages 8, 9. Hope estimated by the "per cent condition" method accrued depreciation at about 35% of reproduction cost new. On that basis Hope contended for a rate base of \$66,000,000. The Commission refused to place any reliance on reproduction cost new, saying that it was "not predicated upon facts" and was "too conjectural and illusory to be given any weight in these proceedings." *Id.*, 44 P.U.R., N.S., at page 8. It likewise refused to give any "probative value" to trended "original cost" since it was "not founded in fact" but was "basically erroneous" and produced "irrational results." *Id.*, 44 P.U.R., N.S., at page 9. In determining the amount of accrued depletion and depreciation the Commission, following *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 167-169, 54 S.Ct. 658, 664-666, 78 L.Ed. 1182; *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 592, 593, 62 S.Ct. 736, 745, 746, 86 L.Ed. 1037, based its computation on "actual legitimate cost". It found that Hope during the years

when its business was not under regulation did not observe "sound depreciation and depletion practices" but "actually accumulated an excessive reserve" of about \$46,000,000. *Id.*, 44 P.U.R.,N.S., at page 18. One member of the Commission thought that the entire amount of the reserve should be deducted from "actual legitimate cost" in determining the rate base. The majority of the Commission concluded, however, that where, as here, a business is brought under regulation for the first time and where incorrect depreciation and depletion practices have prevailed, the deduction of the reserve requirement, (actual existing depreciation and depletion) rather than the excessive reserve should be made so as to lay "a sound basis for future regulation and control of rates." *Id.*, 44 P.U.R.,N.S., at page 18. As we have pointed out, it determined accrued depletion and depreciation to be \$22,328,016; and it allowed approximately \$1,460,000 as the annual operating expense for depletion and depreciation.

Hope's estimate of original cost was about \$69,735,000—approximately \$17,000,000 more than the amount found by the Commission. The item of \$17,000,000 was made up largely of expenditures which prior to December 31, 1938, were charged to operating expenses. Chief among those expenditures was some \$12,600,000 expended in well-drilling prior to 1923. Most of that sum was expended by Hope for labor, use of drilling-rigs, hauling, and similar costs of well-drilling. Prior to 1923 Hope followed the general practice of the natural gas industry and charged the cost of drilling wells to operating expenses. Hope continued that practice until the Public Service Commission of West Virginia in 1923 required it to capitalize such expenditures, as does the Commission under its present Uniform System of Accounts. The Commission refused to add such items to the rate base stating that "No greater injustice to consumers could be done than to allow items as operating expenses and at a later date include them in the rate base, thereby placing multiple charges upon the consumers." *Id.*, 44 P.U.R.,N.S., at page 12. For the same reason the Commission excluded from the rate base about \$1,600,000 of expenditures on properties which Hope acquired from other utilities, the latter having charged those payments to operating expenses. The Commission disallowed certain other overhead items amounting to over \$3,000,000 which also had been previously charged to operating expenses. And it refused to add some \$632,000 as interest during construction since no interest was in fact paid.

Hope contended that it should be allowed a return of not less than 8%. The Commission found that an 8% return would be unreasonable but that 6½% was a fair rate of return. That rate

of return, applied to the rate base of \$33,712,526, would produce \$2,191,314 annually, as compared with the present income of not less than \$5,801,171.

The Circuit Court of Appeals set aside the order of the Commission for the following reasons. (1) It held that the rate base should reflect the "present fair value" of the property, that the Commission in determining the "value" should have considered reproduction cost and trended original cost, and that "actual legitimate cost" (prudent investment) was not the proper measure of "fair value" where price levels had changed since the investment. (2) It concluded that the well-drilling costs and overhead items in the amount of some \$17,000,000 should have been included in the rate base. (3) It held that accrued depletion and depreciation and the annual allowance for that expense should be computed on the basis of "present fair value" of the property not on the basis of "actual legitimate cost".

The Circuit Court of Appeals also held that the Commission had no power to make findings as to past rates in aid of state regulation. But it concluded that those findings were proper as a step in the process of fixing future rates. Viewed in that light, however, the findings were deemed to be invalidated by the same errors which vitiated the findings on which the rate order was based.

*Order Reducing Rates.* Congress has provided in § 4(a) of the Natural Gas Act that all natural gas rates subject to the jurisdiction of the Commission "shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." Sec. 5(a) gives the Commission the power, after hearing, to determine the "just and reasonable rate" to be thereafter observed and to fix the rate by order. Sec. 5(a) also empowers the Commission to order a "decrease where existing rates are unjust \* \* \* unlawful, or are not the lowest reasonable rates." And Congress has provided in § 19(b) that on review of these rate orders the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Congress, however, has provided no formula by which the "just and reasonable" rate is to be determined. It has not filled in the details of the general prescription of § 4(a) and § 5(a). It has not expressed in a specific rule the fixed principle of "just and reasonable".

When we sustained the constitutionality of the Natural Gas Act in the Natural Gas Pipeline Co. case, we stated that the "authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amend-

ment as is that of the states under the Fourteenth to regulate the prices of commodities in intrastate commerce." 315 U.S. at page 582, 62 S.Ct. at page 741, 86 L.Ed. 1037. Rate-making is indeed but one species of price-fixing. *Munn v. Illinois*, 94 U.S. 113, 134, 24 L.Ed. 77. The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid. *Block v. Hirsh*, 256 U.S. 135, 155-157, 41 S.Ct. 458, 459, 460, 65 L.Ed. 865, 16 A.L.R. 165; *Nebbia v. New York*, 291 U.S. 502, 523-539, 54 S.Ct. 505, 509-517, 78 L.Ed. 940, 89 A.L.R. 1469, and cases cited. It does, however, indicate that "fair value" is the end product of the process of rate-making not the starting point as the Circuit Court of Appeals held. The heart of the matter is that rates cannot be made to depend upon "fair value" when the value of the going enterprise depends on earnings under whatever rates may be anticipated.

We held in *Federal Power Commission v. Natural Gas Pipeline Co.*, *supra*, that the Commission was not bound to the use of any single formula or combination or formulae in determining rates. Its rate-making function, moreover, involves the making of "pragmatic adjustments." *Id.*, 315 U.S. at page 586, 62 S.Ct. at page 743, 86 L.Ed. 1037. And when the Commission's order is challenged in the courts, the question is whether that order "viewed in its entirety" meets the requirements of the Act. *Id.*, 315 U.S. at page 586, 62 S.Ct. at page 743, 86 L.Ed. 1037. Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling. Cf. *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U.S. 287, 304, 305, 314, 53 S.Ct. 637, 643, 644, 647, 77 L.Ed. 1180; *West Ohio Gas Co. v. Public Utilities Commission (No. 1)*, 294 U.S. 63, 70, 55 S.Ct. 316, 320, 79 L.Ed. 761; *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 692, 693, 55 S.Ct. 894, 906, 907, 79 L.Ed. 1640 (dissenting opinion). It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Cf. *Railroad Commission v. Cumberland Tel. & T. Co.*, 212 U.S. 414, 29 S.Ct. 357, 53 L.Ed. 577; *Lindheimer v. Illinois Bell Tel. Co.*,

supra, 292 U.S. at pages 164, 169, 54 S.Ct. at pages 663, 665, 78 L.Ed. 1182; *Railroad Commission v. Pacific Gas & E. Co.*, 302 U.S. 388, 401, 58 S.Ct. 334, 341, 82 L.Ed. 319.

The rate-making process under the Act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests. Thus we stated in the *Natural Gas Pipeline Co.* case that "regulation does not insure that the business shall produce net revenues." 315 U.S. at page 590, 62 S.Ct. at page 745, 86 L.Ed. 1037. But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. Cf. *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345, 346, 12 S.Ct. 400, 402, 36 L.Ed. 176. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. See *State of Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Commission*, 262 U.S. 276, 291, 43 S.Ct. 544, 547, 67 L.Ed. 981, 31 A.L.R. 807 (Mr. Justice Brandeis concurring). The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at. For we are of the view that the end result in this case cannot be condemned under the Act as unjust and unreasonable from the investor or company viewpoint.

We have already noted that Hope is a wholly owned subsidiary of the Standard Oil Co. (N.J.). It has no securities outstanding except stock. All of that stock has been owned by Standard since 1908. The par amount presently outstanding is approximately \$28,000,000 as compared with the rate base of \$33,712,526 established by the Commission. Of the total outstanding stock \$11,000,000 was issued in stock dividends. The balance, or about \$17,000,000, was issued for cash or other assets. During the four decades of its operations Hope has paid over \$97,000,000 in cash dividends. It had, moreover, accumulated by 1940 an earned surplus of about \$8,000,000. It had thus earned the total investment in the company nearly seven times. Down to 1940 it earned over 20% per year on the average annual amount of its capital stock issued for cash or other assets. On an average invested capital of

some \$23,000,000 Hope's average earnings have been about 12% a year. And during this period it had accumulated in addition reserves for depletion and depreciation of about \$46,000,000. Furthermore, during 1939, 1940 and 1941, Hope paid dividends of 10% on its stock. And in the year 1942, during about half of which the lower rates were in effect, it paid dividends of 7½%. From 1939-1942 its earned surplus increased from \$5,250,000 to about \$13,700,000, i.e., to almost half the par value of its outstanding stock.

As we have noted, the Commission fixed a rate of return which permits Hope to earn \$2,191,314 annually. In determining that amount it stressed the importance of maintaining the financial integrity of the company. It considered the financial history of Hope and a vast array of data bearing on the natural gas industry, related businesses, and general economic conditions. It noted that the yields on better issues of bonds of natural gas companies sold in the last few years were "close to 3 per cent", 44 P.U.R.,N.S., at page 33. It stated that the company was a "seasoned enterprise whose risks have been minimized" by adequate provisions for depletion and depreciation (past and present) with "concurrent high profits", by "protected established markets, through affiliated distribution companies, in populous and industrialized areas", and by a supply of gas locally to meet all requirements, "except on certain peak days in the winter, which it is feasible to supplement in the future with gas from other sources." Id., 44 P.U.R.,N.S., at page 33. The Commission concluded, "The company's efficient management, established markets, financial record, affiliations, and its prospective business place it in a strong position to attract capital upon favorable terms when it is required." Id., 44 P.U.R.,N.S., at page 33.

In view of these various considerations we cannot say that an annual return of \$2,191,314 is not "just and reasonable" within the meaning of the Act. Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called "fair value" rate base. In that connection it will be recalled that Hope contended for a rate base of \$66,000,000 computed on reproduction cost new. The Commission points out that if that rate base were accepted, Hope's average rate of return for the four-year period from 1937-1940 would amount to 3.27%. During that period Hope earned an annual average return of about 9% on the aver-

age investment. It asked for no rate increases. Its properties were well maintained and operated. As the Commission says such a modest rate of 3.27% suggests an "inflation of the base on which the rate has been computed." *Dayton Power & Light Co. v. Public Utilities Commission*, 292 U.S. 290, 312, 54 S.Ct. 647, 657, 78 L.Ed. 1267. Cf. *Lindheimer v. Illinois Bell Tel. Co.*, *supra*, 292 U.S. at page 164, 54 S.Ct. at page 663, 78 L.Ed. 1182. The incongruity between the actual operations and the return computed on the basis of reproduction cost suggests that the Commission was wholly justified in rejecting the latter as the measure of the rate base.

In view of this disposition of the controversy we need not stop to inquire whether the failure of the Commission to add the \$17,000,000 of well-drilling and other costs to the rate base was consistent with the prudent investment theory as developed and applied in particular cases.

Only a word need be added respecting depletion and depreciation. We held in the *Natural Gas Pipeline Co.* case that there was no constitutional requirement "that the owner who embarks in a wasting-asset business of limited life shall receive at the end more than he has put into it." 315 U.S. at page 593, 62 S.Ct. at page 746, 86 L.Ed. 1037. The Circuit Court of Appeals did not think that that rule was applicable here because Hope was a utility required to continue its service to the public and not scheduled to end its business on a day certain as was stipulated to be true of the *Natural Gas Pipeline Co.* But that distinction is quite immaterial. The ultimate exhaustion of the supply is inevitable in the case of all natural gas companies. Moreover, this Court recognized in *Lindheimer v. Illinois Bell Tel. Co.*, *supra*, the propriety of basing annual depreciation on cost. By such a procedure the utility is made whole and the integrity of its investment maintained. No more is required. We cannot approve the contrary holding of *United Railways & Electric Co. v. West*, 280 U.S. 234, 253, 254, 50 S.Ct. 123, 126, 127, 74 L.Ed. 390. Since there are no constitutional requirements more exacting than the standards of the Act, a rate order which conforms to the latter does not run afoul of the former. \* \* \*

Reversed.

Messrs. Justices REED, FRANKFURTER and JACKSON dissented, each rendering an opinion.

## NOTE

1. In *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77 (1877), the Supreme Court had stated that the question of the reasonableness of rates was a matter for the ultimate determination of the legislature. The subsequent abandonment of this position threw the "rate base" problem into the courts. The Supreme Court's first comprehensive discussion of the "fair value" problem was in *Smyth v. Ames*, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819 (1898). Its development can be traced through the following cases: *Knoxville v. Knoxville Water Co.*, 212 U.S. 1, 29 S.Ct. 148, 53 L.Ed. 371 (1909); *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 29 S.Ct. 192, 53 L.Ed. 382 (1909); *Newton v. Consolidated Gas Co.*, 258 U.S. 165, 42 S.Ct. 264, 66 L.Ed. 538 (1922); *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 43 S.Ct. 544, 67 L.Ed. 981 (1923) (see especially the concurring opinion of Mr. Justice Brandeis); *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 47 S.Ct. 144, 71 L.Ed. 316 (1927); *Los Angeles Gas & Electric Co. v. Railroad Commission of California*, 289 U.S. 287, 53 S.Ct. 637, 77 L.Ed. 1180 (1933); *Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151, 54 S.Ct. 658, 78 L.Ed. 1182 (1934); *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 55 S.Ct. 894, 79 L.Ed. 640 (1935); *McCart v. Indianapolis Water Co.*, 302 U.S. 419, 58 S.Ct. 324, 82 L.Ed. 336 (1938); *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 59 S.Ct. 715, 83 L.Ed. 1134 (1939); *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037 (1942); *Market Street Ry. Co. v. Railroad Commission of California*, 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171 (1945).

2. On the valuation problem, see E. C. Goddard, *Public Utility Valuation*, 15 Mich.L.Rev. 205 (1917); G. C. Henderson, *Railway Valuation in the Courts*, 33 Harv.L.Rev. 902, 1031 (1920); F. G. Dorety, *The Function of Reproduction Cost in Public Utility Valuation and Rate Making*, 37 Harv.L.Rev. 173 (1924); H. Rottschaefer, *Valuation in Rate Cases*, 9 Minn.L.Rev. 211 (1925); J. C. Bonbright, *Economic Merits of Cost and Reproduction Cost*, 41 Harv. L.Rev. 593 (1928); R. L. Hale, *Utility Regulation in the Light of the Hope Natural Gas Case*, 44 Col.L.Rev. 488 (1944); John Bauer, *The Establishment and Administration of a "Prudent Investment" Rate Base*, 53 Yale L.Jour. 495 (1944).

3. For discussion of problems involved in computing net earnings from the regulated service see *United Rys. & Electric Co. of Baltimore v. West*, 280 U.S. 234, 50 S.Ct. 123, 74 L.Ed. 390 (1930) (depreciation); *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255 (1930) (depreciation); *Dayton Power & Light Co. v. Public Utilities Commission of Ohio*, 292 U.S. 290, 54 S.Ct. 647, 78 L.Ed. 1267 (1934) (general expenses); see John Bauer, *Depreciation and Effective Rate Control*, 54 Yale L.Jour. 92 (1944).

4. As to the unit to which the test of non-confiscatory rates is to be applied, see *Norfolk & W. Ry. Co. v. Conley*, 236 U.S. 605, 35 S.Ct. 437, 59 L.Ed. 745 (1915); *Groesbeck v. Duluth, S. S. & A. R. Co.*, 250 U.S. 607, 40 S.Ct. 38, 63 L.Ed. 1167 (1915); *Northern Pac. Ry. Co. v. North Dakota*, 236 U.S. 585, 35 S.Ct. 429, 59 L.Ed. 735 (1919).

5. Resort is frequently required to test periods to determine the confiscatory character of rates; see *Prendergast v. New York Tel. Co.*, 262 U.S. 43, 43 S.Ct. 466, 67 L.Ed. 853 (1923).

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ASBURY HOSPITAL v. CASS COUNTY, N. D.

Supreme Court of the United States, 1945.

326 U.S. 207, 66 S.Ct. 61, 90 L.Ed. 6.

Mr. Chief Justice STONE delivered the opinion of the Court.

Appellant, a Minnesota non-profit corporation, sought, in the state district court of North Dakota, a declaratory judgment that the so-called Initiative Measure of 1932, North Dakota Laws, 1933, pp. 494, 495, as amended by Chap. 89, Laws 1933, and Chap. 111, Laws 1935, is unconstitutional as applied to appellant's North Dakota farming lands.

The challenged statute declares, §§ 2, 3, that corporations both domestic and foreign, which "now own or hold rural real estate, used or usable, for farming or agriculture, except such as is reasonably necessary in the conduct of their business, shall dispose of the same within ten years from the date that this Act takes effect \* \* \*", and that "the ten year limitation provided by this Section shall be deemed a covenant, running with the title to the land against any grantee, successor of (or) assignee of such corporation, which is also a corporation." Farming land in the state owned by any corporation in violation of the statute is, by § 5, made subject to escheat to the county in which it is located, by suit instituted by the county attorney. The county is required to dispose of the land at public auction to the highest bidder within one year after escheat, and to pay the proceeds, less the expenses of sale, to the former corporate owner.

Appellant alleges in its amended complaint that prior to the enactment of the statute it had acquired a tract of land within Cass County, North Dakota, in satisfaction of a mortgage indebtedness, and that it has since leased the property out to farmers who have used it as farm land. The amended complaint further alleges that since the enactment of the statute appellant has constantly attempted to sell this tract, and that it has been and will be unable to sell it for an amount equal to the original mortgage debt before the expiration of the statutory ten year period; that any sale which the county, proceeding under the statute, might be able to make, would be for substantially less than the amount appellant has invested in the land and the costs of sale. The amended complaint sets up that the statute, as applied to appellant's tract, violates the privileges and immunities clauses of

Article IV, § 2 and the Fourteenth Amendment of the Federal Constitution, the contract clause, Article I, § 10, and the due process and equal protection clauses of the Fourteenth Amendment, and prays for a judgment that the statute is unconstitutional and void as applied to appellant and for an injunction restraining respondent county from enforcing the statute.

The Supreme Court of North Dakota sustained an order of the trial court overruling appellee's demurrer to the amended complaint, 72 N. D. 359, 7 N.W.2d 438. Upon remand of the case for further proceedings, the trial court found the allegations of fact set out in the amended complaint to be true, construed the statute as applicable to appellant's land, which was held not to be necessary to the conduct of appellant's business, and sustained the constitutionality of the statute in all respects. The Supreme Court of North Dakota affirmed. 16 N.W.2d 523. The case comes here on appeal under § 237(a) of the Judicial Code, 28 U.S.C. § 344(a), 28 U.S.C.A. § 344(a), appellant repeating in its assignments of error the attack made on the statute by its complaint.

Appellant does not invoke the commerce clause, and is neither a citizen of a state nor of the United States within the protection of the privileges and immunities clauses of Article IV, § 2 of the Constitution and the Fourteenth Amendment. *Paul v. Virginia*, 8 Wall. 168, 177, 19 L.Ed. 357; *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 187, 8 S.Ct. 737, 740, 31 L.Ed. 650; *Selover, B. & Co. v. Walsh*, 226 U.S. 112, 126, 33 S.Ct. 69, 72, 57 L.Ed. 146. The State of North Dakota has granted no charter or certificate of incorporation to appellant, and has issued to it no permit to do business or own property within the state which could give rise to contract rights which appellant could assert against the state. None are to be implied from appellant's mere acquisition of land in the state either before or after the enactment of the statute. *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L.Ed. 595; *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U.S. 602, 620-622, 19 S.Ct. 308, 315, 316, 43 L.Ed. 569; *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 344, 345, 29 S.Ct. 370, 377, 378, 53 L.Ed. 530, 15 Ann.Cas. 645.

The Fourteenth Amendment does not deny to the state power to exclude a foreign corporation from doing business or acquiring or holding property within it. *Horn Silver Mining Co. v. New York*, 143 U.S. 305, 312-315, 12 S.Ct. 403, 404, 405, 36 L.Ed. 164; *Hooper v. California*, 155 U.S. 648, 652, 15 S.Ct. 207, 209, 39 L.Ed. 297; *Munday v. Wisconsin Trust Co.*, 252 U.S. 499, 40 S.Ct. 365, 64 L.Ed. 684; *Crescent Cotton Oil Co. v. Mississippi*, 257 U.S. 129, 137, 42 S.Ct. 42, 44, 66 L.Ed. 166. While recognizing the un-

qualified power of the state to preclude its entry into the state for these purposes, appellant points out that the state has permitted it to enter and to invest its money in obligations secured by mortgage on land within the state, in consequence of which it lawfully acquired the land free of restrictions. Appellant argues that the state may not, by later legislation, force a sale of the land thus innocently acquired, under conditions which do not allow recovery of the original investment. But a state's power to exclude a foreign corporation, or to limit the nature of the business it may conduct within the state, does not end as soon as the corporation has lawfully entered the state and there acquired immovable property. Subsequent legislation excluding such a corporation from continuing in the state has been sustained as an exercise of the general power to exclude foreign corporations which does not offend due process. *Hammond Packing Co. v. Arkansas*, supra, 212 U.S. 342, 343, 29 S.Ct. 376, 377, 53 L.Ed. 530, 15 Ann.Cas. 645; see also *Baltic Mining Co. v. Massachusetts*, 231 U.S. 68, 83, 34 S.Ct. 15, 17, 58 L.Ed. 127. Similarly, this Court has upheld legislation imposing burdens greater than those to which such corporations were subject at the time of their entry on the ground that the state might exclude them altogether at a later date. *Philadelphia Fire Association v. New York*, 119 U.S. 110, 7 S.Ct. 108, 30 L.Ed. 342; *Horn Silver Mining Co. v. New York*, supra; see also *Crescent Cotton Oil Co. v. Mississippi*, supra; *Lincoln National Life Ins. Co. v. Read*, 325 U.S. 673, 65 S.Ct. 1220. Appellant, even if its activities in North Dakota are now restricted to the ownership of farm land within the state, stands in no better position to invoke the protection of the Fourteenth Amendment. The total exclusion of a corporation owning fixed property within a state requires it to sell or otherwise dispose of such property. Appellant must do no more. While appellant is not compelled by the present statute to cease all activities in North Dakota, the greater power includes the less.

Since the state may validly require appellant to sell its farm land, the contention that the statute is wanting in due process because conditions have been such since its enactment that appellant has been and will be unable to salvage an investment made more than ten years before raises no substantial constitutional question. The due process clause does not guarantee that a foreign corporation when lawfully excluded as such from ownership of land in the state shall recapture its cost. It is enough that the corporation, in complying with the lawful command of the state to part with ownership, is afforded a fair opportunity to realize the value of the land, and that the sale, when required, is to be under conditions reasonably calculated to realize its value at the

time of sale. No reason is advanced for saying, and we cannot say that the period of ten years allowed to appellant to dispose of the property, or its sale after ten years at public auction held under direction of the court and comparable generally to a mortgage foreclosure sale, fails to satisfy either of these conditions. As the North Dakota Supreme Court pointed out in its opinion, the statutory escheat of appellant's land is effected by suit to which the corporation must be a party, with full opportunity to be heard in advance. The judgment of sale in conformity to the statute is entered by the court which "has the power to protect the rights of the corporation as to the notice and conduct of the sale by appropriate provisions in its judgment." 72 N.D. 359, 7 N.W.2d 438, 454. \* \* \*

Only two of the equal protection contentions which appellant presses here appear to have been presented to or considered by the state courts. The North Dakota Supreme Court held that the statute's exception from its operation, of lands owned and held by corporations whose business is dealing in farm lands, (§ 2), and of the lands belonging to cooperative corporations, seventy-five percent of whose members or stockholders are farmers residing on farms, or depending principally on farming for their livelihood, (§ 4), did not deny the equal protection claimed. We agree.

The legislature is free to make classifications in the application of a statute which are relevant to the legislative purpose. The ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made. *Metropolitan Ins. Casualty Company v. Brownell*, 294 U.S. 580, 583, 55 S.Ct. 538, 540, 79 L.Ed. 1070, and cases cited. We cannot say that there are no differences between corporations generally and those falling into the excepted classes which may appropriately receive recognition in the legislative application of a state policy against the concentration of farming lands in corporate ownership.

The North Dakota Legislature may have thought that its policy with reference to corporate owned agricultural lands would be advanced by permitting corporations engaged in the business of dealing in farm lands to acquire and sell without restriction lands forced upon the market by the statute. It could have thought that its policy would be in part defeated by withholding authority from farm cooperatives to acquire and use farm lands for agricultural purposes. Cf. *United States v. Rock Royal Co-op.*, 307 U.S. 533, 562-564, 59 S.Ct. 993, 1007-1009, 83 L.Ed. 1446. Statutory discrimination between classes which are in fact different must be presumed to be relevant to a permissible legislative

purpose, and will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it. *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357, 36 S.Ct. 370, 374, 60 L.Ed. 679, L.R.A.1917A, 421, Ann.Cas.1917B, 455; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509, 57 S.Ct. 868, 872, 81 L.Ed. 1245, 109 A.L.R. 1327, and cases cited.

\* \* \*

Affirmed

#### NOTE

1. A state does not violate either the due process or equal protection clauses of the Fourteenth Amendment by prohibiting the direct or indirect ownership of agricultural lands, or an interest therein, by aliens ineligible for federal citizenship; *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255 (1923); *Porterfield v. Webb*, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278 (1923); cf. *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. — (1948). See *D. O. McGovney, The Anti-Japanese Land Laws of California and Ten Other States*, 35 Calif.L.Rev. 7 (1947); *Ferguson, The California Alien Land Law and the Fourteenth Amendment*, 35 Calif.L.Rev. 61 (1947).

2. A state's power over the admission of foreign corporations to transact local business within it is limited by the requirement that it impose no unconstitutional conditions thereon; *Western Union Teleg. Co. v. Kansas*, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355 (1910); *Frost v. Railroad Commission of California*, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101 (1926). See *M. H. Merrill, Unconstitutional Conditions*, 77 U.Pa.L.Rev. 879 (1929); *S. C. Oppenheim, Unconstitutional Conditions and State Powers*, 26 Mich.L.Rev. 176 (1928); *R. L. Hale, Unconstitutional Conditions and Constitutional Rights*, 35 Col.L.Rev. 321 (1935).

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#### MILLER v. SCHOENE.

Supreme Court of the United States, 1928.  
276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568.

Mr. Justice STONE delivered the opinion of the Court.

Acting under the Cedar Rust Act of Virginia, Acts Va.1914, c. 36, as amended by Acts Va.1920, c. 260, now embodied in Va. Code (1924) as sections 885 to 893, defendant in error, the state entomologist, ordered the plaintiffs in error to cut down a large number of ornamental red cedar trees growing on their property, as a means of preventing the communication of a rust or plant disease with which they were infected to the apple orchards in the vicinity. The plaintiffs in error appealed from the order to the circuit court of Shenandoah county which, after a hearing and a consideration of evidence, affirmed the order and al-

lowed to plaintiffs in error \$100 to cover the expense of removal of the cedars. Neither the judgment of the court nor the statute as interpreted allows compensation for the value of the standing cedars or the decrease in the market value of the realty caused by their destruction whether considered as ornamental trees or otherwise. But they save to plaintiffs in error the privilege of using the trees when felled. On appeal the Supreme Court of Appeals of Virginia affirmed the judgment. *Miller v. State Entomologist*, 146 Va. 175, 135 S.E. 813. Both in the circuit court and the Supreme Court of Appeals plaintiffs in error challenged the constitutionality of the statute under the due process clause of the Fourteenth Amendment and the case is properly here on writ of error. Judicial Code, § 237a (28 USCA § 344).

The Virginia statute presents a comprehensive scheme for the condemnation and destruction of red cedar trees infected by cedar rust. By section 1 it is declared to be unlawful for any person to "own, plant or keep alive and standing" on his premises any red cedar tree which is or may be the source or "host plant" of the communicable plant disease known as cedar rust, and any such tree growing within a certain radius of any apple orchard is declared to be a public nuisance, subject to destruction. Section 2 makes it the duty of the state entomologist, "upon the request in writing of ten or more reputable freeholders of any county or magisterial district, to make a preliminary investigation of the locality \* \* \* to ascertain if any cedar tree or trees \* \* \* are the source of, harbor or constitute the host plant for the said disease \* \* \* and constitute a menace to the health of any apple orchard in said locality, and that said cedar tree or trees exist within a radius of two miles of any apple orchard in said locality." If affirmative findings are so made, he is required to direct the owner in writing to destroy the trees and, in his notice, to furnish a statement of the "fact found to exist whereby it is deemed necessary or proper to destroy" the trees and to call attention to the law under which it is proposed to destroy them. Section 5 authorizes the state entomologist to destroy the trees if the owner, after being notified, fails to do so. Section 7 furnishes a mode of appealing from the order of the entomologist to the circuit court of the county, which is authorized to "hear the objections" and "pass upon all questions involved," the procedure followed in the present case.

As shown by the evidence and as recognized in other cases involving the validity of this statute, *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S.E. 141, 12 A.L.R. 1121; *Kelleher v. Schoene* (D.C.) 14 F.2d 341, cedar rust is an infectious plant disease in the form of a fungoid organism which is destructive

of the fruit and foliage of the apple, but without effect on the value of the cedar. Its life cycle has two phases which are passed alternately as a growth on red cedar and on apple trees. It is communicated by spores from one to the other over a radius of at least two miles. It appears not to be communicable between trees of the same species, but only from one species to the other, and other plants seem not to be appreciably affected by it. The only practicable method of controlling the disease and protecting apple trees from its ravages is the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards.

The red cedar, aside from its ornamental use, has occasional use and value as lumber. It is indigenous to Virginia, is not cultivated or dealt in commercially on any substantial scale, and its value throughout the state is shown to be small as compared with that of the apple orchards of the state. Apple growing is one of the principal agricultural pursuits in Virginia. The apple is used there and exported in large quantities. Many millions of dollars are invested in the orchards, which furnish employment for a large portion of the population, and have induced the development of attendant railroad and cold storage facilities.

On the evidence we may accept the conclusion of the Supreme Court of Appeals that the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. \* \* \* And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.

\* \* \*

We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law;

or whether they may be so declared by statute. See *Hadacheck v. Los Angeles*, *supra*, 411 (36 S.Ct. 143). For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process. The injury to property here is no more serious, nor the public interest less than in *Hadacheck v. Los Angeles*, *supra*, *Northwestern Laundry v. Des Moines*, *supra*, *Reinman v. Little Rock*, *supra*, or *Sligh v. Kirkwood*, *supra*.

The statute is not, as plaintiffs in error argue, subject to the vice which invalidated the ordinance considered by this court in *Eubank v. Richmond*, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156, 42 L.R.A.,N.S., 1123, Ann.Cas.1914B, 192. That ordinance directed the committee on streets of the city of Richmond to establish a building line, not less than five nor more than thirty feet from the street line whenever requested to do so by the owners of two-thirds of the property abutting on the street in question. No property owner might build beyond the line so established. Of this the court said (page 143 [33 S.Ct. 77]):

"It [the ordinance] leaves no discretion in the committee on streets as to whether the street [building, semble] line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent."

The function of the property owners there is in no way comparable to that of the "ten or more reputable freeholders" in the Cedar Rust Act. They do not determine the action of the state entomologist. They merely request him to conduct an investigation. In him is vested the discretion to decide, after investigation, whether or not conditions are such that the other provisions of the statute shall be brought into action; and his determination is subject to judicial review. The property of plaintiffs in error is not subjected to the possibly arbitrary and irresponsible action of a group of private citizens.

The objection of plaintiffs in error to the vagueness of the statute is without weight. The state court has held it to be applicable and that is enough when, by the statute, no penalty can be incurred or disadvantage suffered in advance of the judicial ascertainment of its applicability. Compare *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322.

**Affirmed.**

## NOTE

1. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) a mine owner was held deprived of property without due process of law by a statute prohibiting the mining of coal in such a way as to cause the subsidence of buildings used for human habitation, when the statute was applied to protect a person who had acquired the land on which his home was situated from the mine owner under a deed in which the latter reserved the right to mine the coal thereunder free from liability to the homeowner for any damage resulting therefrom. In the course of the Court's opinion Mr. Justice Holmes stated that "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Cf. *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 34 S.Ct. 359, 58 L.Ed. 713 (1914).

2. A state does not violate the due process clause by legislation reasonably adapted to conserving its natural resources; *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 20 S.Ct. 576, 44 L.Ed. 729 (1900); *Bandini Pet. Co. v. Superior Court*, 284 U.S. 8, 52 S.Ct. 103, 76 L. Ed. 136 (1931); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 236 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062 (1932). How far a state may go to prevent economic waste incident to the sale of oil or gas at low prices is considered in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 57 S.Ct. 364, 81 L.Ed. 510 (1937). The problem of regulating the interests of oil producers drawing on a common pool was recently discussed extensively in the dissenting opinion of Mr. Justice Rutledge in *Republic Natural Gas Co. v. Oklahoma*, — U.S. —, 68 S.Ct. 972, 92 L.Ed. — (1948). The majority dismissed the appeal on jurisdictional grounds. It is certain that a majority of the Court would have agreed with Mr. Justice Rutledge on the merits. See D. H. Ford, *Controlling the Production of Oil*, 30 Mich.L.Rev. 1170 (1932); Note, *The Constitutionality of the Oklahoma Oil Pro-ration Orders*, 45 Harv.L. Rev. 557 (1932).

3. The imposition by law of compulsory expenditures is sometimes sustained, as not violative of the due process clause, and sometimes held invalidated by it. It has been held valid to impose on railroads part of the cost of grade separations; *Erie R. Co. v. Public Utility Commission*, 254 U.S. 394, 41 S.Ct. 169, 65 L.Ed. 322 (1921); *Lehigh Valley R. Co. v. Board of Public Utility Com'rs of New Jersey*, 278 U.S. 24, 49 S.Ct. 69, 73 L.Ed. 161 (1928); cf. *Chicago, B. & Q. R. Co. v. Illinois*, 200 U.S. 561, 26 S.Ct. 341, 50 L. Ed. 596 (1906).

4. Legislative fixing of rents during an emergency has been held not to violate the due process clause of either the Fifth Amendment, *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865 (1921); or the Fourteenth Amendment; *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877 (1921). See *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841 (1924)

for discussion of circumstances when enforcement of the policy becomes unconstitutional. As to whether landlords are constitutionally entitled to non-confiscatory rents, see *Wilson v. Brown*, 137 F.2d 348 (Em.App.1943).

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STATE OF WASHINGTON ex rel. SEATTLE TITLE  
TRUST CO. v. ROBERGE.

Supreme Court of the United States, 1928. 278 U.S. 116, 49 S.Ct. 50,  
73 L.Ed. 210, 86 A.L.R. 654.

Mr. Justice BUTLER delivered the opinion of the Court.

Since 1914, the above-named trustee has owned and maintained a philanthropic home for aged poor. It is located about 6 miles from the business center of Seattle, on a tract 267 feet wide, extending from Seward Park avenue to Lake Washington, having an average depth of more than 700 feet and an area of about 5 acres. The home is a structure built for and formerly used as a private residence. It is large enough to accommodate about 14 guests, and usually it has had about that number. The trustee proposes to remove the old building and in its place, at a cost of about \$100,000, to erect an attractive 2½-story fire proof house large enough to be a home for 30 persons. The structure would be located 280 feet from the avenue on the west and about 400 feet from the lake on the east, cover 4 per cent. of the tract, and be mostly hidden by trees and shrubs. The distance between it and the nearest building on the south would be 110 feet, on the north 160, and on the west 365.

A comprehensive zoning ordinance (No. 45382) passed in 1923 divided the city into six use districts, and provided that, with certain exceptions not material here, no building should be erected for any purpose other than that permitted in the district in which the site is located (section 2). The land in question is in the "first residence district." The ordinance permitted in that district single family dwellings, public schools, certain private schools, churches, parks and playgrounds, an art gallery, private conservatories for plants and flowers, railroad and shelter stations (section 3a). And, upon specified conditions, it also permitted garages, stables, buildings for domestic animals, the office of physician, dentist, or other professional person when located in his or her dwelling (section 3b), fraternity, sorority, and boarding houses, a community clubhouse, a memorial building, nurseries, greenhouses, and buildings necessary for the operation of public utilities (section 3c). It declared that the section should not be construed to prohibit the use of vacant

property in such district for gardening or fruit raising, or its temporary use for fairs, circuses, or similar purposes (section 3e). By an ordinance (No. 49179) passed in 1925, section 3c was amended by adding:

"A philanthropic home for children or for old people shall be permitted in first residence district when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building."

Subsequently the trustee, without having obtained consents of other landowners in accordance with the provision just quoted, applied for a permit to erect the new home. It is the superintendent's official duty to issue permits for buildings about to be erected in accordance with valid enactments and regulations. He denied the application solely because of the trustee's failure to furnish such consents. Then the trustee brought this suit in the superior court of King county to secure its judgment and writ commanding the superintendent to issue the permit; and it maintained throughout that the ordinance, if construed to prevent the erection of the proposed building, is arbitrary and repugnant to the due process and equal protection clauses of the Fourteenth Amendment, U.S.C.A.Const. Amend. 14. That court held that the amended ordinance so construed is valid and dismissed the case. Its judgment was affirmed by the highest court of the state. 144 Wash. 74, 256 P. 781.

The trustee concedes that our recent decisions require that in its general scope the ordinance be held valid. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016; *Zahn v. Board of Public Works*, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074; *Gorieb v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228, 53 A.L.R. 1210; *Nectow v. Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842. Is the delegation of power to owners of adjoining land to make inoperative the permission, given by section 3(c) as amended, repugnant to the due process clause? Zoning measures must find their justification in the police power exerted in the interest of the public. *Euclid v. Ambler Realty Co.*, supra, 387 of 272 U.S., 47 S.Ct. 118. "The governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use, is not unlimited and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." *Nectow v. Cambridge*, supra, page 188 of 277 U.S., 48 S.Ct. 448. Legislatures may not, under the guise of the police power impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. \* \* \*

The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. *Yick Wo v. Hopkins*, 188 U.S. 356, 366, 368, 6 S.Ct. 1064, 30 L.Ed. 220. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. *Eubank v. Richmond*, 226 U.S. 137, 143, 33 S.Ct. 76, 57 L.Ed. 156, 42 L.R.A., N.S., 1123; *Browning v. Hooper*, 269 U.S. 396, 46 S.Ct. 141, 70 L.Ed. 330.

*Cusack Co. v. City of Chicago*, 242 U.S. 526, 37 S.Ct. 190, 61 L.Ed. 472, L.R.A.1918A, 136, Ann.Cas.1917C, 594, involved an ordinance prohibiting the putting up of any billboard in a residential district without the consent of owners of a majority of the frontage on both sides of the street in the block where the board was to be erected. The question was whether the clause requiring such consents was an unconstitutional delegation of power and operated to invalidate the prohibition. The case was held unlike *Eubank v. Richmond*, *supra*, and the ordinance was fully sustained. The facts found were sufficient to warrant the conclusion that such billboards would or were liable to endanger the safety and decency of such districts. Pages 529, 530 of 242 U.S. 37 S.Ct. 190. It is not suggested that the proposed new home for aged poor would be a nuisance. We find nothing in the record reasonably tending to show that its construction or maintenance is liable to work any injury, inconvenience or annoyance to the community, the district or any person. The

facts shown clearly distinguish the proposed building and use from such billboards or other uses which by reason of their nature are liable to be offensive.

As the attempted delegation of power cannot be sustained, and the restriction thereby sought to be put upon the permission is arbitrary and repugnant to the due process clause, it is the duty of the superintendent to issue, and the trustee is entitled to have, the permit applied for.

We need not decide whether, consistently with the Fourteenth Amendment, it is within the power of the state or municipality by a general zoning law to exclude the proposed new home from a district defined as is the first district in the ordinance under consideration.

Judgment reversed.

#### NOTE

1. The general principle of zoning ordinances was held not to violate the due process clause in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Their application to particular situations is sometimes held so arbitrary as to violate the due process clause; see *Nectow v. Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928). See N. F. Baker, *The Constitutionality of Zoning Laws*, 20 Ill.L.Rev. 213 (1925); Alfred Bettman, *Constitutionality of Zoning*, 37 Harv.L.Rev. 834 (1924); Note, *Aesthetic Regulation Under the Police Power*, 80 U.Pa.L.Rev. 428 (1932); D. W. Noel, *Retroactive Zoning and Nuisances*, 41 Col. L.Rev. 451 (1941); F. D. G. Ribble, *Due Process Clause as a Limitation on Municipal Discretion in Zoning Legislation*, 16 Va.L.Rev. 689 (1930).

2. In *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917), an ordinance forbidding white or colored persons from moving into and occupying a house in any block upon which the majority of the houses were occupied by persons of the other race was held to deprive the owner of a house of his property without due process of law. Cf. *Corrigan v. Buckley*, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969 (1926), involving a restrictive covenant aimed to insure racial segregation, in which the Court intimated that neither the Fifth nor Thirteenth Amendments prohibited the judicial enforcement of such a covenant. The judicial enforcement of such covenants by a state court has since been held violative of the equal protection clause of the Fourteenth Amendment, *Shelley v. Kraemer*, — U.S. —, 68 S.Ct. 836, 92 L.Ed. — (1948). See D. O. McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements; Covenants or Conditions in Deeds is Unconstitutional*, 33 Calif.L.Rev. 5 (1945); H. I. Kahen, 12 U. Chicago L.Rev. 198 (1945). See for a thorough study of Supreme Court cases involving the negro, Edward F. Waite, *The Negro in the Supreme Court*, 30 Minn.L.Rev. 219 (1946).

## WEST COAST HOTEL CO. v. PARRISH.

Supreme Court of the United States, 1937. 300 U.S. 379, 57 S.Ct. 578,  
81 L.Ed. 703, 108 A.L.R. 1330.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the state of Washington.

The act, entitled "Minimum Wages for Women," authorizes the fixing of minimum wages for women and minors. Laws 1913 (Washington) c. 174, p. 602, Remington's Rev.Stat.(1932) § 7623 et seq. It provides:

"Section 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

"Sec. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.

"Sec. 3. There is hereby created a commission to be known as the 'Industrial Welfare Commission' for the State of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the State of Washington, as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women."

Further provisions required the commission to ascertain the wages and conditions of labor of women and minors within the state. Public hearings were to be held. If after investigation the commission found that in any occupation, trade, or industry the wages paid to women were "inadequate to supply them necessary cost of living and to maintain the workers in health," the commission was empowered to call a conference of representatives of employers and employees together with disinterested persons representing the public. The conference was to recommend to the commission, on its request, an estimate of a minimum wage adequate for the purpose above stated, and on the approval of such a recommendation it became the duty of the commission to issue an obligatory order fixing minimum wages. Any such order might be reopened and the question reconsidered with

the aid of the former conference or a new one. Special licenses were authorized for the employment of women who were "physically defective or crippled by age or otherwise," and also for apprentices, at less than the prescribed minimum wage.

By a later act the Industrial Welfare Commission was abolished and its duties were assigned to the Industrial Welfare Committee consisting of the Director of Labor and Industries, the Supervisor of Industrial Insurance, the Supervisor of Industrial Relations, the Industrial Statistician, and the Supervisor of Women in Industry. Laws 1921 (Washington) c. 7, p. 12, Remington's Rev. Stat. (1932) §§ 10840, 10893.

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was \$14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States, U.S.C.A.Const. amend. 14. The Supreme Court of the state, reversing the trial court, sustained the statute and directed judgment for the plaintiffs. *Parrish v. West Coast Hotel Co.*, 185 Wash. 581, 55 P.2d 1083. The case is here on appeal.

The appellant relies upon the decision of this Court in *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238, which held invalid the District of Columbia Minimum Wage Act (40 Stat. 960) which was attacked under the due process clause of the Fifth Amendment, U.S.C.A.Const. amend. 5. On the argument at bar, counsel for the appellees attempted to distinguish the *Adkins* Case upon the ground that the appellee was employed in a hotel and that the business of an innkeeper was affected with a public interest. That effort at distinction is obviously futile, as it appears that in one of the cases ruled by the *Adkins* opinion the employee was a woman employed as an elevator operator in a hotel. *Adkins v. Lyons*, 261 U.S. 525, at page 542, 43 S.Ct. 394, 395, 67 L.Ed. 785, 24 A.L.R. 1238.

The recent case of *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 56 S.Ct. 918, 80 L.Ed. 1347, 103 A.L.R. 1445, came here on certiorari to the New York court which had held the New York minimum wage act for women to be invalid. A minority of this Court thought that the New York statute was distinguishable in a material feature from that involved in the *Adkins* Case and that for that and other reasons the New York statute should be sustained. But the Court of Appeals of New York had said that it found no material difference between the two statutes and

this Court held that the "meaning of the statute" as fixed by the decision of the state court "must be accepted here as if the meaning had been specifically expressed in the enactment." 298 U.S. 587, at page 609, 56 S.Ct. 918, 922, 80 L.Ed. 1347, 103 A.L.R. 1445. That view led to the affirmance by this Court of the judgment in the Morehead Case, as the Court considered that the only question before it was whether the Adkins Case was distinguishable and that reconsideration of that decision had not been sought. Upon that point the Court said: "The petition for the writ sought review upon the ground that this case [Morehead] is distinguishable from that one [Adkins]. No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was asked or granted. \* \* \* Here the review granted was no broader than that sought by the petitioner. \* \* \* He is not entitled and does not ask to be heard upon the question whether the Adkins Case should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar." 298 U.S. 587, at pp. 604, 605, 56 S.Ct. 918, 920, 80 L.Ed. 1347, 103 A.L.R. 1445.

We think that the question which was not deemed to be open in the Morehead Case is open and is necessarily presented here. The Supreme Court of Washington has upheld the minimum wage statute of that state. It has decided that the statute is a reasonable exercise of the police power of the state. In reaching that conclusion, the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the Adkins Case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of the state court demands on our part a re-examination of the Adkins Case. The importance of the question, in which many states having similar laws are concerned, the close division by which the decision in the Adkins Case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the state must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration.

The history of the litigation of this question may be briefly stated. The minimum wage statute of Washington was enacted over twenty-three years ago. Prior to the decision in the instant

case, it had twice been held valid by the Supreme Court of the state. *Larsen v. Rice*, 100 Wash. 642, 171 P. 1037; *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 P. 595. The Washington statute is essentially the same as that enacted in Oregon in the same year. Laws 1913 (Oregon) c. 62, p. 92. The validity of the latter act was sustained by the Supreme Court of Oregon in *Stettler v. O'Hara*, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas.1916A, 217, and *Simpson v. O'Hara*, 70 Or. 261, 141 P. 158. These cases, after reargument, were affirmed here by an equally divided court, in 1917. 243 U.S. 629, 37 S.Ct. 475, 61 L.Ed. 937. The law of Oregon thus continued in effect. The District of Columbia Minimum Wage Law (40 Stat. 960) was enacted in 1918. The statute was sustained by the Supreme Court of the District in the *Adkins Case*. Upon appeal the Court of Appeals of the District first affirmed that ruling, but on rehearing reversed it and the case came before this Court in 1923. The judgment of the Court of Appeals holding the act invalid was affirmed, but with Chief Justice Taft, Mr. Justice Holmes, and Mr. Justice Sanford dissenting, and Mr. Justice Brandeis taking no part. The dissenting opinions took the ground that the decision was at variance with the principles which this Court had frequently announced and applied. In 1925 and 1927, the similar minimum wage statutes of Arizona and Arkansas were held invalid upon the authority of the *Adkins Case*. The Justices who had dissented in that case bowed to the ruling and Mr. Justice Brandeis dissented. *Murphy v. Sardell*, 269 U.S. 530, 46 S.Ct. 22, 70 L.Ed. 396; *Donham v. West-Nelson Co.*, 273 U.S. 657, 47 S.Ct. 343, 71 L.Ed. 825. The question did not come before us again until the last term in the *Morehead Case*, as already noted. In that case, briefs supporting the New York statute were submitted by the states of Ohio, Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey, and Rhode Island. 298 U.S. page 604, note, 56 S.Ct. 920, 80 L.Ed. 1347, 103 A.L.R. 1445. Throughout this entire period the Washington statute now under consideration has been in force.

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the states, as the due process clause invoked in the *Adkins Case* governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and

uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described.

"But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U.S. 549, 565, 31 S.Ct. 259, 262, 55 L.Ed. 328.

This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (*Holden v. Hardy*, 169 U.S. 366, 18 S.Ct. 383, 42 L. Ed. 780); in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (*Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 22 S.Ct. 1, 46 L.Ed. 55); in forbidding the payment of seamen's wages in advance (*Patterson v. The Bark Eudora*, 190 U.S. 169, 23 S.Ct. 821, 47 L.Ed. 1002); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (*McLean v. Arkansas*, 211 U.S. 539, 29 S.Ct. 206, 53 L.Ed. 315); in prohibiting contracts limiting liability for injuries to employees (*Chicago, Burlington & Quincy R. Co. v. McGuire*, *supra*); in limiting hours of work of employees in manufacturing establishments (*Bunting v. Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830, *Ann.Cas.*1918A, 1043); and in maintaining workmen's compensation laws (*New York Central R. Co. v. White*, 243 U.S. 188,

37 S.Ct. 247, 61 L.Ed. 667, L.R.A.1917D, 1, Ann.Cas.1917D, 629; *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685, Ann.Cas.1917D, 642). In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. *Chicago, Burlington & Quincy R. Co. v. McGuire*, supra, 219 U.S. 549, at page 570, 31 S.Ct. 259, 55 L.Ed. 328.

The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in *Holden v. Hardy*, supra, where we pointed out the inequality in the footing of the parties. We said (Id., 169 U.S. 366, 397, 18 S.Ct. 383, 390, 42 L.Ed. 780) :

"The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority."

And we added that the fact "that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself." "The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer."

It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the state has a special interest. That phase of the subject received elaborate consideration in *Muller v. Oregon*, 1908, 208 U. S. 412, 28 S.Ct. 324, 326, 52 L.Ed. 551, 13 Ann.Cas. 957, where the constitutional authority of the state to limit the working hours of women was sustained. We emphasized the consideration that "woman's physical structure and the performance of ma-

ternal functions place her at a disadvantage in the struggle for subsistence" and that her physical well being "becomes an object of public interest and care in order to preserve the strength and vigor of the race." We emphasized the need of protecting women against oppression despite her possession of contractual rights. We said that "though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right." Hence she was "properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained." We concluded that the limitations which the statute there in question "places upon her contractual powers, upon her right to agree with her employer, as to the time she shall labor" were "not imposed solely for her benefit, but also largely for the benefit of all." Again, in *Quong Wing v. Kirkendall*, 223 U.S. 59, 63, 32 S.Ct. 192, 56 L.Ed. 350, in referring to a differentiation with respect to the employment of women, we said that the Fourteenth Amendment did not interfere with state power by creating a "fictitious equality." We referred to recognized classifications on the basis of sex with regard to hours of work and in other matters, and we observe that the particular points at which that difference shall be enforced by legislation were largely in the power of the state. In later rulings this Court sustained the regulation of hours of work of women employees in *Riley v. Massachusetts*, 232 U.S. 671, 34 S.Ct. 469, 58 L.Ed. 788 (factories), *Miller v. Wilson*, 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628, L.R.A.1915F, 829 (hotels), and *Bosley v. McLaughlin*, 236 U.S. 385, 35 S.Ct. 345, 59 L.Ed. 632 (hospitals).

This array of precedents and the principles they applied were thought by the dissenting Justices in the *Adkins* Case to demand that the minimum wage statute be sustained. The validity of the distinction made by the Court between a minimum wage and a maximum of hours in limiting liberty of contract was especially challenged. 261 U.S. 525, at page 564, 43 S.Ct. 394, 403, 67 L.Ed. 785, 24 A.L.R. 1238. That challenge persists and is without any satisfactory answer. As Chief Justice Taft observed: "In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to the one is not any greater in essence than the other, and is of the same kind. One is the multiplier and the other the multiplicand." And Mr. Justice Holmes, while recognizing that "the distinctions of the law are

distinctions of degree," could "perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate." *Id.*, 261 U.S. 525, at p. 569, 43 S.Ct. 394, 405, 67 L.Ed. 785, 24 A.L.R. 1238.

One of the points which was pressed by the Court in supporting its ruling in the *Adkins* Case was that the standard set up by the District of Columbia Act did not take appropriate account of the value of the services rendered. In the *Morehead* Case, the minority thought that the New York statute had met that point in its definition of a "fair wage" and that it accordingly presented a distinguishable feature which the Court could recognize within the limits which the *Morehead* petition for certiorari was deemed to present. The Court, however, did not take that view and the New York Act was held to be essentially the same as that for the District of Columbia. The statute now before us is like the latter, but we are unable to conclude that in its minimum wage requirement the state has passed beyond the boundary of its broad protective power.

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees, and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service. The statement of Mr. Justice Holmes in the *Adkins* Case is pertinent: "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld." 261 U.S. 525, at page 570, 43 S.Ct. 394, 406, 67 L.Ed. 785, 24 A.L.R. 1238. And Chief Justice Taft forcibly pointed out the consideration which is basic in a statute of this character: "Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law, and that while in individual cases, hardship may result,

the restriction will enure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large." *Id.*, 261 U.S. 525, at page 563, 43 S.Ct. 394, 403, 67 L.Ed. 785, 24 A.L.R. 1238.

We think that the views thus expressed are sound and that the decision in the *Adkins Case* was a departure from the true application of the principles governing the regulation by the state of the relation of employer and employed. Those principles have been reenforced by our subsequent decisions. Thus in *Radice v. New York*, 264 U.S. 292, 44 S.Ct. 325, 68 L.Ed. 690, we sustained the New York statute which restricted the employment of women in restaurants at night. In *O'Gorman & Young v. Hartford Fire Insurance Company*, 282 U.S. 251, 51 S.Ct. 130, 75 L.Ed. 324, 72 A.L.R. 1163, which upheld an act regulating the commissions of insurance agents, we pointed to the presumption of the constitutionality of a statute dealing with a subject within the scope of the police power and to the absence of any factual foundation of record for deciding that the limits of power had been transcended. In *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469, dealing with the New York statute providing for minimum prices for milk, the general subject of the regulation of the use of private property and of the making of private contracts received an exhaustive examination, and we again declared that if such laws "have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied"; that "with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal"; that "times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." *Id.*, 291 U.S. 502, at pages 537, 538, 54 S.Ct. 505, 516, 78 L.Ed. 940, 89 A.L.R. 1469.

With full recognition of the earnestness and vigor which characterize the prevailing opinion in the *Adkins Case*, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence

is not an admissible means to that end? The Legislature of the state was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The Legislature was entitled to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The Legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many states evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the state of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend

its regulation to all cases which it might possibly reach. The Legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest." If "the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." There is no "doctrinaire requirement" that the legislation should be couched in all embracing terms. \* \* \* This familiar principle has repeatedly been applied to legislation which singles out women, and particular classes of women, in the exercise of the state's protective power. \* \* \* Their relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment.

Our conclusion is that the case of *Adkins v. Children's Hospital*, supra, should be, and it is, overruled. The judgment of the Supreme Court of the state of Washington is affirmed.

Affirmed.

Mr. Justice SUTHERLAND.

Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, Mr. Justice BUTLER, and I think the judgment of the court below should be reversed. \* \* \*

#### NOTE

1. That the due process clause of the Fifth Amendment does not prohibit Congress from fixing minimum wages, see *U. S. v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941).

2. It is very unlikely that legislation prescribing maximum hours of labor would be held unconstitutional today unless it became exceedingly extreme; for constitutional development in this area of economic control, see *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905); *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908); *Bunting v. Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830 (1917).

3. On the general subject of the validity of labor legislation, see V. F. Harper, *Due Process of Law in State Labor Legislation*, 26 Mich.L.Rev. 599, 763, 888 (1928).

SENN v. TILE LAYERS PROTECTIVE UNION, LOCAL  
NO. 5.

Supreme Court of the United States, 1937. 301 U.S. 468, 57 S.Ct. 857,  
81 L.Ed. 1229.

Mr. Justice BRANDEIS delivered the opinion of the Court.

This case presents the question whether the provisions of the Wisconsin Labor Code which authorize giving publicity to labor disputes, declare peaceful picketing and patrolling lawful and prohibit granting of an injunction against such conduct, violate, as here construed and applied, the due process clause or equal protection clause of the Fourteenth Amendment, U.S.C.A.Const. Amend. 14.

The Labor Code occupies sections 103.51 to 103.63 of the Wisconsin Statutes, 1935 (Wis.Laws, 1931, c. 376; Laws, 1935, c. 551, § 5). But only the following provisions of section 103.53 are directly involved on this appeal:

“(1) The following acts, whether performed singly or in concert, shall be legal: \* \* \*

“(e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof. \* \* \*

“(l) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal.

“(2) No court, nor any judge or judges thereof, shall have jurisdiction to issue any restraining order or temporary or permanent injunction which, in specific or general terms, prohibits any person or persons from doing whether singly or in concert, any of the foregoing acts.”

On December 28, 1935, Senn brought this suit in the circuit court of Milwaukee county against Tile Layers Protective Union, Local No. 5, Tile Layers Helpers Union, Local No. 47, and their business agents, seeking an injunction to restrain picketing, and particularly “publishing, stating or proclaiming that the plaintiff is unfair to organized labor or to the defendant unions”; and also to restrain some other acts which have since been discontinued, and are not now material. The defendants answered; and the case was heard upon extensive evidence. The trial court found the following facts:

The journeymen tile layers at Milwaukee were, to a large extent, members of Tile Layers Protective Union, Local No. 5, and the helpers, members of Tile Layers Helpers Union, Local No. 47. Senn was engaged at Milwaukee in the tile contracting business under the name of "Paul Senn & Co., Tile Contracting." His business was a small one, conducted, in the main, from his residence, with a showroom elsewhere. He employed one or two journeymen tile layers and one or two helpers, depending upon the amount of work he had contracted to do at the time. But, working with his own hands with tools of the trade, he performed personally on the jobs much work of a character commonly done by a tile layer or a helper. Neither Senn, nor any of his employees, was at the time this suit was begun a member of either union, and neither had any contractual relations with them. Indeed, Senn could not become a member of the tile layers union, since its constitution and rules require, among other things, that a journeyman tile setter shall have acquired his practical experience through an apprenticeship of not less than three years, and Senn had not served such an apprenticeship.

For some years the tile laying industry had been in a demoralized state because of lack of building operations; and members of the union had been in competition with nonunion tile layers and helpers in their effort to secure work. The tile contractors by whom members of the unions were employed had entered into collective bargaining agreements with the unions governing wages, hours, and working conditions. The wages paid by the union contractors had for some time been higher than those paid by Senn to his employees.

Because of the peculiar composition of the industry, which consists of employers with small numbers of employees, the unions had found it necessary for the protection of the individual rights of their members in the prosecution of their trade to require all employers agreeing to conduct a union shop to assent to the following provision:

"Article III. It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper but that the installation of all materials claimed by the party of the second part as listed under the caption 'Classification of Work' in this agreement, shall be done by journeymen members of Tile Layers Protective Union Local #5."

The unions endeavored to induce Senn to become a union contractor; and requested him to execute an agreement in form

substantially identical with that entered into by the Milwaukee contractors who employ union men. Senn expressed a willingness to execute the agreement provided article III was eliminated. The union declared that this was impossible; that the inclusion of the provision was essential to the unions' interests in maintaining wage standards and spreading work among their members; and, moreover, that to eliminate article III from the contract with Senn would discriminate against existing union contractors, all of whom had signed agreements containing the article. As the unions declared its elimination impossible, Senn refused to sign the agreement and unionize his shop. Because of his refusal, the unions picketed his place of business. The picketing was peaceful, without violence, and without any unlawful act. The evidence was that the pickets carried one banner with the inscription "P, Senn Tile Company is unfair to the Tile Layers Protective Union," another with the inscription "Let the Union tile layer install your tile work."

The trial court denied the injunction and dismissed the bill. On the findings made, it ruled that the controversy was "a labor dispute" within the meaning of section 103.62; that the picketing, done solely in furtherance of the dispute, was "lawful" under section 103.53; that it was not unlawful for the defendants "to advise, notify or persuade, without fraud, violence or threat thereof, any person or persons, of the existence of said labor dispute; \* \* \*

"That the agreement submitted by the defendants to the plaintiff, setting forth terms and conditions prevailing in that portion of the industry which is unionized, is sought by the defendants for the purpose of promoting their welfare and enhancing their own interests in their trade and craft as workers in the industry.

"That Article III of said agreement is a reasonable and lawful rule adopted by the defendants out of the necessities of employment within the industry and for the protection of themselves as workers and craftsmen in the industry."

Senn appealed to the Supreme Court of the state, which affirmed the judgment of the trial court and denied a motion for rehearing, two judges dissenting. 222 Wis. 383, 268 N.W. 270, 274, 872. The case is here on appeal.

First. The defendants moved to dismiss the appeal for want of jurisdiction. They contend that the federal question presented is not substantial. And friends of the court suggest that the appeal should be dismissed because the decision below was based upon nonfederal grounds, or that there was an alternative, independent nonfederal ground broad enough to sustain the judg-

ment; that the challenge here is not to a statute, but to a judicial decision based upon principles of general law which have been approved by some judges and disapproved by others; and that there is nothing to show that the provisions of the Wisconsin Labor Code here questioned are not merely declaratory of the common law of Wisconsin as it existed prior to the statute. But it sufficiently appears that the provisions of the Labor Code were relied upon; that their validity under the Fourteenth Amendment was duly challenged below; and that the rulings by the state courts were based ultimately on the Labor Code. Whether the statute as construed and applied violates the Fourteenth Amendment presents issues never expressly passed upon by this Court. We deny the motion to dismiss.

Second. The hearings below were concerned mainly with questions of state law. Senn insisted there that the statute was no defense, because the controversy was not a "labor dispute" within the meaning of section 103.62. The courts ruled that the controversy was a "labor dispute"; and that the acts done by the defendant were among those declared "lawful" by section 103.53. See, also, *American Furniture Co. v. I. B., etc., Chauffeurs, etc., General Local No. 200*, 222 Wis. 338, 268 N.W. 250, 106 A.L.R. 335. Those issues involved the construction and application of the statute and the Constitution of the state. As to them, the judgment of its highest court is conclusive. The question for our decision is whether the statute, as applied to the facts found, took Senn's liberty or property or denied him equal protection of the laws in violation of the Fourteenth Amendment. Senn does not claim broadly that the Federal Constitution prohibits a state from authorizing publicity and peaceful picketing. His claim of invalidity is rested on the fact that he refused to unionize his shop solely because the union insisted upon the retention of article III. He contends that the right to work in his business with his own hands is a right guaranteed by the Fourteenth Amendment and that the state may not authorize unions to employ publicity and picketing to induce him to refrain from exercising it.

The unions concede that Senn, so long as he conducts a non-union shop, has the right to work with his hands and tools. He may do so, as freely as he may work his employees longer hours and at lower wages than the union rules permit. He may bid for contracts at a low figure based upon low wages and long hours. But the unions contend that, since Senn's exercise of the right to do so is harmful to the interests of their members, they may seek by legal means to induce him to agree to unionize his shop and to refrain from exercising his right to work with his own hands. The judgment of the highest court of the state

establishes that both the means employed and the end sought by the unions are legal under its law. The question for our determination is whether either the means or the end sought is forbidden by the Federal Constitution.

Third. Clearly the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. The state may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets. If the end sought by the unions is not forbidden by the Federal Constitution, the state may authorize working men to seek to attain it by combining as pickets, just as it permits capitalists and employers to combine in other ways to attain their desired economic ends. The Legislature of Wisconsin has declared that “peaceful picketing and patrolling” on the public streets and places shall be permissible “whether engaged in singly or in numbers” provided this is done “without intimidation or coercion” and free from “fraud, violence, breach of the peace, or threat thereof.” The statute provides that the picketing must be peaceful; and that term as used implies not only absence of violence, but absence of any unlawful act. It precludes the intimidation of customers. It precludes any form of physical obstruction or interference with the plaintiff’s business. It authorizes giving publicity to the existence of the dispute “whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be”; but precludes misrepresentation of the facts of the controversy. And it declares that “nothing herein shall be construed to legalize a secondary boycott.” See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 466, 41 S.Ct. 172, 176, 65 L.Ed. 349, 16 A.L.R. 196. Inherently, the means authorized are clearly unobjectionable. In declaring such picketing permissible, Wisconsin has put this means of publicity on a par with advertisements in the press.

The state courts found that the unions observed the limitations prescribed by the statute. The conduct complained of is patrol with banners by two or four pickets. Compare *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 207, 42 S.Ct. 72, 77, 66 L.Ed. 189, 27 A.L.R. 360. The picketing was peaceful. The publicity did not involve a misrepresentation of fact; nor was any claim made below that relevant facts were suppressed. Senn did not contend that it was untruthful to characterize him as “unfair,” if the requirement that he refrain from

working with his own hands was a lawful one. He did not ask that the banners be required to carry a fuller statement of the facts. Compare *American Furniture Co. v. I. B., etc., Chauffeurs, etc.*, General Local No. 200, 222 Wis. 338, 340, 347, 268 N.W. 250, 251, 255, 106 A.L.R. 335. Moreover, it was confessedly open to Senn to disclose the facts in such manner and in such detail as he deemed desirable, and on the strength of the facts to seek the patronage of the public.

*Truax v. Corrigan*, 257 U.S. 312, 42 S.Ct. 124, 128, 66 L.Ed. 254, 27 A.L.R. 375, is not applicable. The statute there in question was deemed to have been applied to legalize conduct which was not simply peaceful picketing, not "lawful persuasion or inducing," not "a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage." It consisted of libelous attacks and abusive epithets against the employer and his friends; libelous and disparaging statements against the plaintiff's business; threats and intimidation directed against customers and employees. The means employed, in other words, were deemed to constitute "an admitted tort," conduct unlawful prior to the statute challenged. See 257 U.S. 312, at pages 327, 328; 337, 346, 42 S.Ct. 124, 127, 128, 131, 134, 66 L.Ed. 254, 27 A.L.R. 375. In the present case the only means authorized by the statute and in fact resorted to by the unions have been peaceful and accompanied by no unlawful act. It follows, that if the end sought is constitutional—if the unions may constitutionally induce Senn to agree to refrain from exercising the right to work in his business with his own hands, their acts were lawful.

Fourth. The end sought by the unions is not unconstitutional. Article III, which the unions seek to have Senn accept, was found by the state courts to be not arbitrary or capricious, but a reasonable rule "adopted by the defendants out of the necessities of employment within the industry and for the protection of themselves as workers and craftsmen in the industry." That finding is amply supported by the evidence. There is no basis for a suggestion that the unions' request that Senn refrain from working with his own hands, or their employment of picketing and publicity, was malicious; or that there was a desire to injure Senn. The sole purpose of the picketing was to acquaint the public with the facts and, by gaining its support, to induce Senn to unionize his shop. There was no effort to induce Senn to do an unlawful thing. There was no violence, no force was applied, no molestation or interference, no coercion. There was only the persuasion incident to publicity. As the Supreme Court of Wisconsin said:

"Each of the contestants is desirous of the advantage of doing the business in the community where he or they operate. He is not obliged to yield to the persuasion exercised upon him by respondents. \* \* \* The respondents do not question that it is appellant's right to run his own business and earn his living in any lawful manner which he chooses to adopt. What they are doing is asserting their rights under the acts of the Legislature for the purpose of enhancing their opportunity to acquire work for themselves and those whom they represent. \* \* \* The respondents' act of peaceful picketing is a lawful form of appeal to the public to turn its patronage from appellant to the concerns in which the welfare of the members of the unions is bound up."

The unions acted, and had the right to act as they did, to protect the interests of their members against the harmful effect upon them of Senn's action. Compare *American Steel Foundries v. Tri-City Central Trades Council*, supra, 257 U.S. 184, 208, 209, 42 S.Ct. 72, 78, 66 L.Ed. 189, 27 A.L.R. 360. Because his action was harmful, the fact that none of Senn's employees was a union member, or sought the union's aid, is immaterial.

The laws of Wisconsin, as declared by its highest court, permit unions to endeavor to induce an employer, when unionizing his shop, to agree to refrain from working in his business with his own hands—so to endeavor although none of his employees is a member of a union. Whether it was wise for the state to permit the unions to do so is a question of its public policy—not our concern. The Fourteenth Amendment does not prohibit it.

Fifth. There is nothing in the Federal Constitution which forbids unions from competing with nonunion concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars, or by his window display. Each member of the unions, as well as Senn, has the right to strive to earn his living. Senn seeks to do so through exercise of his individual skill and planning. The union members seek to do so through combination. Earning a living is dependent upon securing work; and securing work is dependent upon public favor. To win the patronage of the public each may strive by legal means. Exercising its police power, Wisconsin has declared that in a labor dispute peaceful picketing and truthful publicity are means legal for unions. It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. Compare *Pennsylvania Railroad Co. v. United States Railroad Labor*

Board, 261 U.S. 72, 43 S.Ct. 278, 67 L.Ed. 536. It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right.

Sixth. It is contended that in prohibiting an injunction the statute denied to Senn equal protection of the laws, and *Truax v. Corrigan*, *supra*, is invoked. But the issue suggested by plaintiff does not arise. For we hold that the provisions of the Wisconsin statute which authorized the conduct of the unions are constitutional. One has no constitutional right to a "remedy" against the lawful conduct of another.

Affirmed.

[Mr. Justice BUTLER dissented in an opinion concurred in by Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS and Mr. Justice SUTHERLAND.]

#### NOTE

1. Earlier decisions had held violative of due process clauses, as an unreasonable interference with freedom of contract, legislation aimed at protecting the right of labor to organize against interference by employers; see *Adair v. U. S.*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436 (1908); *Coppage v. Kansas*, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915). A change of judicial attitude was developed in *Texas & N. O. R. Co. v. Brotherhood of Railway & S. S. Clerks*, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034 (1930), and *Virginian Ry. Co. v. System Federation*, No. 40, etc., 308 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937), which is reflected in the reported case and in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937) which held valid against due process objections legislation affirmatively protecting labor unionism and the right of collective bargaining.

## THORNHILL v. ALABAMA.

Supreme Court of the United States, 1940.  
310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093.

Mr. Justice MURPHY delivered the opinion of the Court.

Petitioner, Byron Thornhill, was convicted in the Circuit Court of Tuscaloosa County, Alabama, of the violation of Section 3448 of the State Code of 1923. The Code Section reads as follows: "§ 3448. Loitering or picketing forbidden.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

The complaint against petitioner is phrased substantially in the very words of the statute. The first and second counts charge that petitioner, without just cause or legal excuse, did "go near to or loiter about the premises" of the Brown Wood Preserving Company with the intent or purpose of influencing others to adopt one of enumerated courses of conduct. In the third count, the charge is that petitioner "did picket" the works of the Company "for the purpose of hindering, delaying or interfering with or injuring [its] lawful business". Petitioner demurred to the complaint on the grounds, among others, that Section 3448 was repugnant to the Constitution of the United States (Amendment 1) in that it deprived him of "the right of peaceful assemblage", "the right of freedom of speech", and "the right to petition for redress". The demurrer, so far as the record shows, was not ruled upon, and petitioner pleaded not guilty. The Circuit Court then proceeded to try the case without a jury, one not being asked for or demanded. At the close of the case for the State, petitioner moved to exclude all the testimony taken at the trial on the ground that Section 3448 was violative of the Constitution of the United States. The Circuit Court overruled the motion, found petitioner "guilty of Loitering and Picketing as charged

in the complaint", and entered judgment accordingly. The judgment was affirmed by the Court of Appeals, which considered the constitutional question and sustained the section on the authority of two previous decisions in the Alabama courts.

\* \* \* A petition for certiorari was denied by the Supreme Court of the State. The case is here on certiorari granted because of the importance of the questions presented. \* \* \*

The proofs consist of the testimony of two witnesses for the prosecution. It appears that petitioner on the morning of his arrest was seen "in company with six or eight other men" "on the picket line" at the plant of the Brown Wood Preserving Company. Some weeks previously a strike order had been issued by a Union, apparently affiliated with The American Federation of Labor, which had as members all but four of the approximately one hundred employees of the plant. Since that time a picket line with two picket posts of six to eight men each had been maintained around the plant twenty-four hours a day. The picket posts appear to have been on Company property, "on a private entrance for employees, and not on any public road." One witness explained that practically all of the employees live on Company property and get their mail from a post office on Company property and that the Union holds its meetings on Company property. No demand was ever made upon the men not to come on the property. There is no testimony indicating the nature of the dispute between the Union and the Preserving Company, or the course of events which led to the issuance of the strike order, or the nature of the efforts for conciliation.

The Company scheduled a day for the plant to resume operations. One of the witnesses, Clarence Simpson, who was not a member of the Union, on reporting to the plant on the day indicated, was approached by petitioner who told him that "they were on strike and did not want anybody to go up there to work." None of the other employees said anything to Simpson, who testified: "Neither Mr. Thornhill nor any other employee threatened me on the occasion testified to. Mr. Thornhill approached me in a peaceful manner, and did not put me in fear; he did not appear to be mad." "I then turned and went back to the house, and did not go to work." The other witness, J. M. Walden, testified: "At the time Mr. Thornhill and Clarence Simpson were talking to each other, there was no one else present, and I heard no harsh words and saw nothing threatening in the manner of either man." For engaging in some or all of these activities, petitioner was arrested, charged, and convicted as described.

First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.

The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impair those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. Compare *United States v. Carolene Products*, 304 U.S. 144, 152, 153n, 58 S.Ct. 778, 783, 784, 82 L.Ed. 1234. Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should "weigh the circumstances" and "appraise the substantiality of the reasons advanced" in support of the challenged regulations. *Schneider v. State*, 308 U.S. 147, 161, 162, 60 S.Ct. 146, 150, 151, 84 L.Ed. 155.

Second. The section in question must be judged upon its face.

The finding against petitioner was a general one. It did not specify the testimony upon which it rested. The charges were framed in the words of the statute and so must be given a like construction. The courts below expressed no intention of narrowing the construction put upon the statute by prior State decisions. In these circumstances, there is no occasion to go behind the face of the statute or of the complaint for the purpose of determining whether the evidence, together with the permissible inferences to be drawn from it, could ever support a conviction founded upon different and more precise charges. "Conviction upon a charge not made would be sheer denial of due process." *De Jonge v. Oregon*, 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278; *Stromberg v. California*, 283 U.S. 359, 367, 368, 51

S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484. The State urges that petitioner may not complain of the deprivation of any rights but his own. It would not follow that on this record petitioner could not complain of the sweeping regulations here challenged.

There is a further reason for testing the section on its face. Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. \* \* \* The cases when interpreted in the light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an appreciation of the character of the evil inherent in a licensing system.  
\* \* \*

Third. Section 3448 has been applied by the State courts so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor; the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer. *O'Rourke v. City of Birmingham*, 27 Ala.App. 133, 168 So. 206, certiorari denied 232 Ala. 355, 168 So. 209. The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute.

The numerous forms of conduct proscribed by Section 3448 are subsumed under two offenses: the first embraces the activities of all who "without a just cause or legal excuse" "go near to or loiter about the premises" of any person engaged in a lawful business for the purpose of influencing or inducing others to adopt any of certain enumerated courses of action; the second, all who "picket" the place of business of any such person "for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another." It is apparent that one or the other of the offenses comprehends every practicable method whereby the facts of a labor dispute may be publicized in

the vicinity of the place of business of an employer. The phrase "without a just cause or legal excuse" does not in any effective manner restrict the breadth of the regulation; the words themselves have no ascertainable meaning either inherent or historical. Compare *Lanzetta v. New Jersey*, 306 U.S. 451, 453-455, 59 S.Ct. 618, 619, 83 L.Ed. 888. The courses of action, listed under the first offense, which an accused—including an employee—may not urge others to take, comprehends those which in many instances would normally result from merely publicizing, without annoyance or threat of any kind, the facts of a labor dispute. An intention to hinder, delay or interfere with a lawful business, which is an element of the second offense, likewise can be proved merely by showing that others reacted in a way normally expectable of some upon learning the facts of a dispute. The vague contours of the term "picket" are nowhere delineated. Employees or others, accordingly, may be found to be within the purview of the term and convicted for engaging in activities identical with those proscribed by the first offense. In sum, whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise, all such activity without exception is within the inclusive prohibition of the statute so long as it occurs in the vicinity of the scene of the dispute.

Fourth. We think that Section 3448 is invalid on its face.

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matter of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. The Continental Congress in its letter sent to the Inhabitants of Quebec (October 26, 1774) referred to the "five great rights" and said: "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." *Journal of the Continental Congress*, 1904 Ed., vol. I, pp. 104, 108. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace

all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. \* \* \* It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in *Senn's case* (301 U.S. at page 478, 57 S.Ct. at page 862, 81 L.Ed. 1229): "Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. See Mr. Justice Brandeis in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, at page 488, 41 S.Ct. 172, 184, 65 L.Ed. 349, 16 A.L.R. 196. It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society.

The range of activities proscribed by Section 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448.

The State urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing. The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare *American Steel Foundries v. Tri-City Council*, 257 U.S. 184, 205, 42 S.Ct. 72, 77, 66 L.Ed. 189, 27 A.L.R. 360. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of

the community and that of the individual in freedom of discussion on matters of public concern.

It is not enough to say that Section 3448 is limited or restricted in its application to such activity as takes place at the scene of the labor dispute. "[The] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." \* \* \* The danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by Section 3448.

Reversed.

Mr. Justice McREYNOLDS is of opinion that the judgment below should be affirmed.

#### NOTE

1. The Supreme Court has, in later decisions, imposed some limits upon the exercise of the right of peaceful picketing; see *Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836 (1941); *Carpenters Joiners Union v. Ritters Cafe*, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143 (1942). It has been intimated but not held, that false bannering might be validly prohibited, *Cafeteria Employees Union, etc. v. Angelos*, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58 (1943). The right to picket may not be limited to employees of the employer being picketed, *American Federation of Labor v. Swing*, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855 (1941). See Ludwig Teller, *Picketing and Free Speech*, 56 Harv.L.Rev. 180 (1943); E. M. Dodd, Jr., *Picketing and Free Speech: A Dissent*, 56 Harv.L.Rev. 513 (1943); Ludwig Teller, *Picketing and Free Speech: A Reply*, 56 Harv.L.Rev. 532 (1943). See also E. M. Dodd, Jr., *The Supreme Court and Organized Labor*, 58 Harv.L.Rev. 1018 (1945).

2. There is a present trend in the direction of regulating labor unions and their activities. A state statute prohibiting them from denying a person membership by reason of race, color or creed, or denying any member equality of treatment for any such reason, has been held not to violate the due process or equal protection clauses of the Fourteenth Amendment, *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 65 S.Ct. 1483, 89 L.Ed. 2072 (1945). But a state statute which required a paid union organizer to register with a state official before soliciting members for his organization was held an invalid denial of freedom of speech so far as it rendered illegal the act of a union official addressing an organizational meeting at which he made both general and specific solicitations to join the union, *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945).

3. The due process clauses do not prevent government from imposing some limitations on the right to strike, *Dorchy v. Kansas*, 272 U.S. 306, 47 S.Ct. 86, 71 L.Ed. 248 (1926).

4. The due process clauses also protect the employer's right to present his side of a labor dispute to both the public and his employees, *National Labor Relations Board v. Virginia Electric Power Co.*, 314 U.S. 469, 62 S.Ct. 344, 86 L.Ed. 348 (1941). In a concurring opinion of Mr. Justice Douglas in *Thomas v. Collins*, supra, par. 4, it is stated that "No one may be required to obtain a license to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. This is true whether he be an employer or employee. But as long as he does no more than speak he has the same unfettered right, no matter what side of an issue he espouses." Purely commercial communication, such as advertising, does not enjoy the same freedom from governmental restraints as political, social and economic discussions, *Valentine v. Christensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942).

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#### CHAS. WOLFF PACKING CO v. COURT OF INDUSTRIAL RELATIONS.

Supreme Court of the United States, 1925. 267 U.S. 552, 45 S.Ct. 441, 69 L.Ed. 785.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This was an original proceeding in mandamus in the Supreme Court of Kansas to compel the Wolff Packing Company to put into effect an order of a state agency, called the Court of Industrial Relations, determining a dispute respecting wages, hours, labor and working conditions in a slaughtering and packing plant owned and operated by the company. The order was made in a compulsory proceeding under a Kansas statute, called the Industrial Relations Act, Laws Special Session 1920, c. 29, and consisted of 19 distinct paragraphs—some fixing wages, some fixing hours of labor and pay for overtime, and others prescribing working conditions. After a hearing, the Supreme Court eliminated the paragraphs relating to working conditions, because made without the required notice, and awarded a peremptory writ of mandamus commanding obedience to the other paragraphs. *Court of Industrial Relations v. Charles Wolff Packing Co.*, 109 Kan. 629, 201 P. 418; *Id.*, 111 Kan. 501, 207 P. 806. That judgment was brought to this court for review and was reversed, with a direction that the case be remanded for further proceedings not inconsistent with the opinion rendered at the time. 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280. After receiving the mandate, the state court vacated its original judgment,

eliminated the paragraphs relating to working conditions and those fixing wages, also eliminated from the paragraphs fixing hours of labor the clauses relating to pay for overtime, and awarded a peremptory writ of mandamus commanding obedience to what remained of the last paragraphs. *Court of Industrial Relations v. Charles Wolff Packing Co.*, 114 Kan. 304, 219 P. 259. On a rehearing, the court modified that judgment by awarding a peremptory writ of mandamus to compel obedience to the paragraphs fixing hours of labor, including the clauses relating to pay for overtime. 114 Kan. 487, 227 P. 249. The paragraphs to which obedience was thus finally commanded are as follows:

"(3) A basic working day of 8 hours shall be observed in this industry; but a 9-hour day may be observed not to exceed 2 days in any 1 week without penalty: Provided, however, that if the working hours of the week shall exceed 48 in number, all over 48 shall be paid for at the rate of time and one-half; furthermore, in case a day in excess of the 8-hour day shall be observed more than 2 days in any 1 week, all over 8 hours, except for said 2 days in said week, shall be paid for at the rate of time and one-half, even though the working hours of the week may be 48 hours or fewer."

"(14) Workers paid by the week or day, if employed within the plant and not within the office or sales department, shall be subject to hours of work and overtime as other employees under the terms of finding No. 3 hereof."

"(19) In departments operating 24 hours a day and 7 days a week, each employee therein shall be entitled to 1 day off each week. In other departments work performed on Sunday and legal holidays shall be paid for at the rate of time and one-half."

The order, according to its terms, was to remain in force until changed by the Court of Industrial Relations or by agreement of the parties with the approval of that agency. \* \* \*

The declared and adjudged purpose of the act is to insure continuity of operation and production in certain businesses which it calls "essential industries." To that end it provides for the compulsory settlement by a state agency of all labor controversies in such businesses which endanger the intended continuity. It proceeds on the assumption that the public has a paramount interest in the subject which justifies the compulsion. The businesses named include, among others, that of manufacturing or preparing food products for sale and human consumption. The controversies to be settled include, among others, those arising between employer and employees over either

wages or hours of labor. The state agency charged with the duty of making the settlement is the Court of Industrial Relations. Although called a court, it is an administrative board. It is to summon the disputants before it, to give them a hearing, to settle the matter in controversy—as by fixing wages or hours of labor, where they are what is in dispute—to embody its findings and determination in an order, and, if need be, to institute mandamus proceedings in the Supreme Court of the state to compel compliance with its order. The order is to continue in effect for such reasonable time as the agency may fix, or until changed by agreement of the parties with its approval. The employer may discontinue the business (a) where it can be conducted conformably to the order only at a loss; or (b) where for good cause shown the agency approves; and individual employees may quit the service in the exercise of a personal privilege, but may not induce others to quit or combine with them to do so. With these qualifications, both employer and employees are required to continue the business on the terms fixed in the order; violations and evasions being penalized. The authority given to the agency to fix wages or hours of labor is not general, nor is it to be exerted independently of the system of compulsory settlement. On the contrary, it is but a feature of that system, and correspondingly limited in purpose and field of application. No distinction is made between wages and hours of labor; both are put on the same plane. In the fixing of wages regard is to be had for what is fair between employer and employees, and in the fixing of hours of labor regard is to be had for what are healthful periods; but neither is to be fixed save in the compulsory adjustment of an endangering controversy to the end that the business shall go on.

The following excerpt from the opinion of the Supreme Court of the state in *State ex rel. v. Howat*, 109 Kan. 376, 417, 198 P. 686, 705, 25 A.L.R. 1210, explains the pervading theory of the act:

“Heretofore the industrial relationship has been tacitly regarded as existing between two members—industrial manager, and industrial worker. They have joined whole-heartedly in excluding others. The Legislature proceeded on the theory there is a third member of those industrial relationships which have to do with production, preparation and distribution of the necessities of life—the public. The Legislature also proceeded on the theory the public is not a silent partner. Whenever the dissensions of the other two become flagrant, the third member may see to it the business does not stop.”

On three occasions when the act was before us we referred to it as undertaking to establish a system of “compulsory arbitra-

tion." *Howat v. Kansas*, 258 U.S. 181, 184, 42 S.Ct. 277, 66 L.Ed. 550; *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 542, 43 S.Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280; *Dorchy v. Kansas*, 264 U.S. 286, 288, 44 S.Ct. 323, 68 L.Ed. 686. The Supreme Court of the state in a recent opinion criticizes this use of the term "arbitration." *State v. Howat*, 116 Kan. 412, 415, 227 P. 752. We recognize that in its usual acceptation the term indicates a proceeding based entirely on the consent of the parties. And we recognize also that this act dispenses with their consent. Under it they have no voice in selecting the determining agency, or in defining what that agency is to investigate and determine. And yet the determination is to bind them, even to the point of preventing them from agreeing on any change in the terms fixed therein, unless the agency approves. To speak of a proceeding with such attributes merely as an arbitration might be subject to criticism, but we think its nature is fairly reflected when it is spoken of as a compulsory arbitration. Of course, our present concern is with the essence of the system rather than its name. In this connection it is well to observe that in the opinion last mentioned the state court recognizes that the system, while intended to be just between employer and employees, proceeds on the theory that the public interest is paramount, as was explained in *State ex rel. v. Howat*, supra.

The survey just made of the act, as construed and applied in the decisions of the Supreme Court of the state, shows very plainly that its purpose is not to regulate wages or hours of labor either generally or in particular classes of business, but to authorize the state agency to fix them where, and in so far as, they are the subjects of a controversy the settlement of which is directed in the interest of the public. In short, the authority to fix them is intended to be merely a part of the system of compulsory arbitration and to be exerted in attaining its object, which is continuity of operation and production.

When the case was first here the question chiefly agitated, and therefore discussed and decided, was whether the authority to fix wages as an incident of the compulsory arbitration could be applied to a business like that of the Wolff Company consistently with the protection which the due process of law clause of the Fourteenth Amendment, U.S.C.A.Const. amend. 14, affords to the liberty of contract and rights of property. The question was answered in the negative and the act was held invalid in so far as it gives that authority. The subject was much considered and the principles which were recognized and applied were distinctly stated.

At the outset the court pointed out that the act assumes as a "necessary postulate" that the state, in the interest of the public, "may compel those engaged in the manufacture of food, and clothing, and the production of fuel, whether owners or workers, to continue in their business and employment on terms fixed by an agency of the state if they cannot agree." Then, after referring to the limited privilege of withdrawing from the business or employment which the act accords to owners and employees who may be dissatisfied with the determination, the court said:

"These qualifications do not change the essence of the act. It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. *Meyer v. Nebraska*, ante, 390. While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238."

Various matters which were relied on as justifying the attempted restraint or abridgment were considered and pronounced inadequate. Among them was the assumption in the act that a business like that in question—preparing food for sale and human consumption—is so far affected with a public interest that the state may compel its continuance, and, if the owner and employees cannot agree, may fix the terms through a public agency to the end that there shall be continuity of operation and production. This assumption was held to be without any sound basis and its indulgence by the state Legislature was declared not controlling. The court recognized that, in a sense, all business is of some concern to the public, and subject to some measure of regulation, but made it plain that the extent to which regulation reasonably may go varies greatly with different classes of business and is not a matter of legislative discretion solely, but is a judicial question to be determined with due regard to the rights of the owner and employees. Care was taken to point out that operating a railroad, keeping an inn, conducting an elevator, and following a common calling are not all in the same class, and particularly to point out the distinctions between a quasi public business conducted under a public grant imposing a correlative duty to operate, a business originally private which comes to be affected with a public interest through a change in pais, and a business

which not only was private in the beginning but has remained such. The conclusion was that power to compel the continuance of a business because affected with a public interest is altogether exceptional. \* \* \*

Applying these principles, the court was of opinion that the business in question is one which the state is without power to compel the owner and employees to continue.

On further reflection we regard the principles so stated and applied as entirely sound. They are as applicable now as they were then. The business is the same and the parties are the same. So we reach the same conclusion now that we reached then.

The system of compulsory arbitration which the act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making. It will constrain them, not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. True, the terms have some qualifications, but as shown in the prior decision the qualifications are rather illusory and do not subtract much from the duty imposed. Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment. \* \* \*

The authority which the act gives respecting the fixing of hours of labor is merely a feature of the system of compulsory arbitration and has no separate purpose. It was exerted by the state agency as a part of that system and the state court sustained its exertion as such. As a part of the system it shares the invalidity of the whole. Whether it would be valid had it been conferred independently of the system and made either general or applicable to all businesses of a particular class we need not consider, for that was not done.

It follows that the state court should have declined to give effect to any part of the order of the state agency.

No. 207. Writ of error dismissed.

No. 299. Judgment reversed.

#### NOTE

1. See S. P. Simpson, *Constitutional Limitations on Compulsory Arbitration*, 38 Harv.L.Rev. 753 (1925).

## CHASE SECURITIES CORPORATION v. DONALDSON.

Supreme Court of the United States, 1945.  
325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628.

Mr. Justice JACKSON delivered the opinion of the Court.

This appeal from a judgment of the Supreme Court of Minnesota attacks as violative of the Fourteenth Amendment a provision of the Minnesota statutes enacted as part of a general revision of the Minnesota Securities or Blue Sky Law. Its effect upon appellant was to lift the bar of the statute of limitations in a pending litigation, which appellant contends amounts to taking its property without due process of law.

This action was brought in state court in November, 1937, to recover the purchase price of "Chase units," sold by appellant in Minnesota to the appellee's testate August 10, 1929. The "units" had not been registered as required by the laws of that state. The action was based in part on illegality of the sale, but it also was grounded on common-law fraud and deceit. Defendant relied among other defenses on the statute of limitations. Plaintiff countered that the running of the statute had been suspended because defendant had withdrawn from the state and the statute did not run during its absence. The case was tried by the court without a jury. It found that there was a sale in violation of the Blue Sky Law, that the Minnesota 6-year statute of limitations, Mason's Minn.St.1927, § 9191, applying to actions "upon a liability created by statute" governed the case but had been tolled by withdrawal of the appellant from the state in 1931. Judgment was therefore rendered for the purchase price adjusted for interest and dividends and the Court found it unnecessary to pass on the fraud issues.

The Supreme Court of Minnesota reversed. It held by reference to a companion case that the statute of limitations had not been tolled by the appellant's absence from the state because it had designated agents to receive service of process after its departure as required by statute. The case was remanded on January 10, 1941 without prejudice to further proceedings on "issues other than that of the tolling of the statute of limitations."

While proceedings were pending in the lower court, the legislature enacted a statute, effective July 1, 1941, which amended the Blue Sky Law in many particulars not pertinent here. The section in question added a specific statute of limitations applicable to actions based on violations of the Blue Sky Law as to

which there had been no provision except a general statute of limitations. Under the former law the limitation on actions for fraud did not commence to run until its discovery. Under the new law, actions for failure to disclose non-registration or for misrepresentations concerning registration, or for falsity of representations implied from the fact of sale, all of which grounds were set up in this action, must be brought within six years of delivery of the securities. Aggrieved purchasers were therefore denied future benefit of suspension of the period of limitation during the time such frauds or grounds of action remained undiscovered. But it also was provided that where delivery had occurred more than five years prior to the effective date of the Act, which was the fact in this case, the action might be brought within one year after the law's enactment. The effect of this was to abolish any defense that appellant might otherwise have made under the Minnesota statutes of limitation.

Both appellant and appellee moved in the trial court, shortly after the Act became effective, for supplemental findings. Appellant asked findings in its favor on the theory that the action was barred, that the new Act was inapplicable, and that there was no proof of actual fraud. Appellee contended that the 1941 law applied and that by reason of it recovery was not barred. The trial court determined that the plaintiff was entitled to recover in tort both on the ground of an illegal sale and on the ground of common-law fraud and deceit; that plaintiff had not discovered the deception until shortly before the action was begun; that the provisions of the 1941 Act applied to the plaintiff's "cause of action, or any of the separate grounds of relief asserted by plaintiff," and operated to extend the time for the commencement of action thereon to July 1, 1942 and that plaintiff's action was therefore commenced within the time limited by the statutes of Minnesota. The appellant moved for amended findings and then for the first time raised the federal constitutional question that the statute, if applied so to lift the bar, deprived appellant of property without due process of law, in violation of the Fourteenth Amendment. Its motion was denied.

Appealing again to the Supreme Court of Minnesota, appellant among other things urged this federal constitutional question. The Supreme Court again did not reach decision of the fraud aspects of the case. It held that the Blue Sky Law required the securities to be registered and was violated by the sale; that the action was one in tort to recover as damages the purchase price of unregistered securities sold in Minnesota; that the new limitations statute was applicable and had the effect of lifting any pre-existing bar of the general limitation statute and that in so doing it did not violate the due process clause of the Fourteenth Amendment. The court

relied on *Campbell v. Holt*, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483, saying: "We do not find that *Campbell v. Holt* has been reversed or reconsidered and we regard it as sound law; and, certainly, so far as the Federal Constitution is concerned, it is binding on this court until reversed by the Supreme Court." The judgment was therefore, affirmed, rehearing was sought and denied, and the case brought here by appeal.

As the case stood in the state courts it is not one where a defendant's statutory immunity from suit had been fully adjudged so that legislative action deprived it of a final judgment in its favor. The lower court had decided against appellant. The Supreme Court had confined its reversal to one question—whether the defendant's withdrawal from the state tolled the running of the statute of limitations. The case was returned to the lower court without prejudice to any other question. \* \* \*

The substantial federal questions which survive the state court decision are whether this case is governed by *Campbell v. Holt* and if so, whether that case should be reconsidered and overruled.

In *Campbell v. Holt*, *supra*, this Court held that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar. This has long stood as a statement of the law of the Fourteenth Amendment, and we agree with the court below that its holding is applicable here and fatal to the contentions of appellant.

Appellant asks that in case we find *Campbell v. Holt* controlling it be reconsidered and overruled. We are reminded that some state courts have not followed it in construing provisions of their constitutions similar to the due process clause. Many have, as they are privileged to do, so interpreted their own easily amendable constitutions to give restrictive clauses a more rigid interpretation than we properly could impose upon them from without by construction of the federal instrument which is amendable only with great difficulty and with the co-operation of many States.

We are also cited to some criticisms of *Campbell v. Holt* in legal literature. But neither in volume nor in weight are they more impressive than has been directed at many decisions that deal with controversial and recurrent issues.

Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law. There has been controversy as to their effect. Some are of opinion that like the analogous civil law doctrine of prescription limitations statutes should be viewed as extinguishing the claim and destroying the right itself. Admittedly it is troublesome to sustain as a "right" a claim that can find no remedy for its invasion. On the other hand, some common-law courts have regarded true statutes of limitation as doing no more than to cut off resort to the courts for enforcement of a claim. We do not need to settle these arguments.

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. \* \* \* They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

This Court, in *Campbell v. Holt*, adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value. The contrast between the acceptable result of the reasoning of *Campbell v. Holt* and its rather unsatisfactory rationalization was well pointed out by Mr. Justice Holmes when as Chief Justice of Massachusetts he wrote:

"Nevertheless in this case, as in others, the prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on

fundamental grounds. Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power. *Camfield v. United States*, 167 U.S. 518, 523, 524, 17 S.Ct. 864 [866, 867], 42 L.Ed. 260. But, however that may be multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small." *Danforth v. Groton Water Co.*, 178 Mass. 472, 476, 59 N.E. 1033, 86 Am.St.Rep. 495. This statement was approved and followed by the New York Court of Appeals in *Robinson v. Robins Dry Dock & Repair Co.*, 238 N.Y. 271, 144 N.E. 579, 36 A.L.R. 1310.

The essential holding in *Campbell v. Holt*, so far as it applies to this case, is sound and should not be overruled. The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Some rules of law probably could not be changed retroactively without hardship and oppression, and this whether wise or unwise in their origin. Assuming that statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment. Nor has the appellant pointed out special hardships or oppressive effects which result from lifting the bar in this class of cases with retrospective force. This is not a case where appellant's conduct would have been different if the present rule had been known and the change foreseen. It does not say, and could hardly say, that it sold unregistered stock depending on a statute of limitation for shelter from liability. The nature of the defenses shows that no course of action was undertaken by appellant on the assumption that the old rule would be continued. When the action was commenced, it no doubt expected to be able to defend by invoking Minnesota public policy that lapse of time had closed the courts to the case, and its legitimate hopes have been disappointed. But the exist-

ence of the policy at the time the action was commenced did not, under the circumstances, give the appellant a constitutional right against change of policy before final adjudication. Whatever grievance appellant may have at the change of policy to its disadvantage, it had acquired no immunity from this suit that has become a federal constitutional right. The judgment is affirmed.

Affirmed.

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

### NOTE

1. The following other recent cases consider various aspects of the constitutionality of retroactive civil legislation; *Paramino Lbr. Co. v. Marshall*, 309 U.S. 370, 60 S.Ct. 600, 84 L.Ed. 814 (1940); *Demorest v. City Bk. Farmers Trust Co.*, 321 U.S. 36, 64 S.Ct. 384, 88 L.Ed. 526 (1944); *Fleming v. Rhodes*, 331 U.S. 100, 67 S.Ct. 1140, 91 L.Ed. 1368 (1947).

2. See Note, *Reviving Right of Action Barred by Limitation*, 19 Ill.L.Rev. 355 (1925); Note, *Campbell v. Holt—Rule or Exception*, 35 Yale L.Jour. 478 (1926); Note, *Deprivation of "Property" by Retroactive Legislation*, 25 Col.L.Rev. 470 (1925); E. S. Stimson, *Retroactive Application of Laws. A Problem in Constitutional Law*, 38 Mich.L.Rev. 30 (1939); Note, *Constitutionality of the Portal-to-Portal Act*, 47 Col.L.Rev. 1070 (1947); G. E. Cotter, *The Constitutionality of Retroactive Legislation—The Portal-to-Portal Act of 1947*, 34 Va.L.Rev. 26 (1948).

## CHAPTER 16

### THE CONTRACT CLAUSE

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#### NEW ORLEANS WATER-WORKS CO. v. LOUISIANA SUGAR REFINING CO.

Supreme Court of United States, 1888. 125 U.S. 18, 8 S.Ct. 741,  
31 L.Ed. 607.

[Error to the Supreme Court of Louisiana, which had affirmed a judgment of the civil district court of New Orleans in favor of the Louisiana Sugar Company, denying an injunction against laying water pipes asked by the plaintiff. The facts appear in the opinion.]

Mr. Justice GRAY. The plaintiff, in its original petition, relied on a charter from the legislature of Louisiana, which granted to it the exclusive privilege of supplying the city of New Orleans and its inhabitants with water from the Mississippi river, but provided that the city counsel should not be thereby prevented from granting to any person "contiguous to the river" the privilege of laying pipes to the river for his own use. The only matter complained of by the plaintiff, as impairing the obligation of the contract contained in its charter, was an ordinance of the city council, granting to the Louisiana Sugar Refining Company permission to lay pipes from the river to its factory, which, the plaintiff contended, was not contiguous to the river. The Louisiana Sugar Refining Company, in its answer, alleged that its factory was contiguous to the river; that it had the right as a riparian proprietor to draw water from the river for its own use; that its pipes were being laid for its own use only; that the plaintiff had no exclusive privilege that would impair such use of the water by the defendant company; and that the rights and privileges claimed by the plaintiff would constitute a monopoly, and be therefore null and void. The evidence showed that the pipes of the defendant company were being laid exclusively for the use of its factory, and that no private ownership intervened between it and the river, but only a public street, and a broad quay or levee, owned by the city and open to the public, except that some large sugar sheds, occupied by lessees of the city,

stood upon it, and that the tracks of a railroad were laid across it. \* \* \*

The only grounds on which the plaintiff in error attacks the judgment of the state court are that the court erred in its construction of the contract between the state and the plaintiff, contained in the plaintiff's charter; and in not adjudging that the ordinance of the city counsel, granting to the defendant company permission to lay pipes from its factory to the river, was void, because it impaired the obligation of that contract.  
\* \* \*

This being a writ of error to the highest court of a state, a federal question must have been decided by that court against the plaintiff in error; else this court has no jurisdiction to review the judgment. \* \* \*

In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, U.S.C.A.Const. art. 1, § 10, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals. This court, therefore, has no jurisdiction to review a judgment of the highest court of a state, on the ground that the obligation of a contract has been impaired, unless some legislative act of the state has been upheld by the judgment sought to be reviewed. The general rule, as applied to this class of cases, has been clearly stated in two opinions of this court, delivered by Mr. Justice Miller: "It must be the Constitution or some law of the state which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the state court must sustain the law or Constitution of the state, in the matter in which the conflict is supposed to exist; or the case for this court does not arise." *Railroad Co. v. Rock*, 4 Wall. 177, 181, 18 L.Ed. 381. "We are not authorized by the judiciary act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." *Knox v. Bank*, 12 Wall. 379, 383, 20 L.Ed. 287.

As later decisions have shown, it is not strictly and literally true that a law of a state, in order to come within the constitu-

tional prohibition, must be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a Constitution established by the people of the state as their fundamental law. In *Williams v. Bruffy*, 96 U.S. 176, 183, 24 L.Ed. 716, it was said by Mr. Justice Field, delivering judgment: "Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the clause cited relating to the jurisdiction of this court," (Rev.St. § 709;) and it was therefore held that a statute of the so-called Confederate States, if enforced by one of the states as its law, was within the prohibition of the Constitution. So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States. For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power. *United States v. New Orleans*, 98 U.S. 381, 392, 25 L.Ed. 225; *Meriwether v. Garrett*, 102 U.S. 472, 26 L.Ed. 197. \* \* \*

But the ordinance now in question involved no exercise of legislative power. The legislature, in the charter granted to the plaintiff, provided that nothing therein should "be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his or their own use." The legislature itself thus defined the class of persons to whom, and the object for which, the permission might be granted. All that was left to the city council was the duty of determining what persons came within the definition, and how and where they might be permitted to lay pipes, for the purpose of securing their several rights to draw water from the river, without unreasonably interfering with the convenient use by the public of the lands and highways of the city. The rule was established by the legislature, and its execution only committed to the municipal authorities. The power conferred upon the city council was not legislative, but administrative, and might equally well have been vested by law in the mayor alone, or in any other officer of the city. *Railroad Co. v. Ellerman*, 105 U.S. 166, 172, 26 L.Ed. 1015; *Day v. Green*, 4 Cush., Mass., 433, 438. The permission granted by the city council to the defendant com-

pany, though put in the form of an ordinance, was in effect but a license, and not a by-law of the city, still less a law of the state. If that license was within the authority vested in the city council by the law of Louisiana, it was valid; if it transcended that authority, it was illegal and void. But the question whether it was lawful or unlawful depended wholly on the law of the state, and not at all on any provision of the Constitution or laws of the United States. \* \* \*

[After discussing various cases:] These cases are quite in harmony with the line of cases, beginning before these were decided, in which, on a writ of error upon a judgment of the highest court of a state, giving effect to a statute of the state, drawn in question as affecting the obligation of a previous contract, this court, exercising its paramount authority of determining whether the statute upheld by the state court did impair the obligation of the previous contract, is not concluded by the opinion of the state court as to the validity or the construction of that contract, even if contained in a statute of the state, but determines for itself what that contract was. Leading cases of that class are *Bridge Prop'r's v. Hoboken Co.*, 1 Wall. 116, 17 L.Ed. 571, in which the state court affirmed the validity of a statute authorizing a railway viaduct to be built across a river, which was drawn in question as impairing the obligation of a contract, previously made by the state with the proprietors of a bridge, that no other bridge should be built across the river; and cases in which the state court affirmed the validity of a statute, imposing taxes upon a corporation, and drawn in question as impairing the obligation of a contract in a previous statute exempting it from such taxation. *Bank v. Knoop*, 16 How. 369, 14 L.Ed. 977; *Trust Co. v. Debolt*, 16 How. 416, 14 L.Ed. 997; *Bank v. Debolt*, 18 How. 380, 15 L. Ed. 458; *Bank v. Skelly*, 1 Black, 436, 17 L.Ed. 173; *New Jersey v. Yard*, 95 U.S. 104, 24 L.Ed. 352; *Railroad v. Gaines*, 97 U.S. 697, 709, 24 L.Ed. 1091; *University v. People*, 99 U.S. 309, 25 L.Ed. 387; *Railroad v. Palmes*, 109 U.S. 244, 3 S.Ct. 193, 27 L.Ed. 922; *Gas-Light Co. v. Shelby Co.*, 109 U.S. 398, 3 S.Ct. 205; *Railroad Co. v. Dennis*, 116 U.S. 665, 6 S.Ct. 625, 29 L.Ed. 770. In each of those cases, the state court upheld a right claimed under the later statute, and could not have made the decision that it did without upholding that right; and thus gave effect to the law of the state drawn in question as impairing the obligation of a contract. The distinction between the two classes of cases,—those in which the state court has, and those in which it has not, given effect to the statute drawn in question as impairing the obligation of a contract,—as effect-

ing the consideration by this court, on writ of error, of the true construction and effect of the previous contract, is clearly brought out in *Railroad v. Railroad*, 14 Wall. 23, 20 L.Ed. 850. That was a writ of error to the supreme judicial court of Maine, in which a foreclosure, under a statute of 1857, of a railroad mortgage made in 1852, was contested upon the ground that it impaired the obligation of the contract, and the parties agreed that the opinion of that court should be considered as part of the record. Mr. Justice Miller, in delivering judgment, after stating that it did appear that the question whether the statute of 1857 impaired the obligation of the mortgage contract "was discussed in the opinion of the court, and that the court was of the opinion that the statute did not impair the obligation of the contract," said: "If this were all of the case, we should undoubtedly be bound in this court to inquire whether the act of 1857 did, as construed by that court, impair the obligation of the contract. *Bridge Propr's v. Hoboken Co.*, 1 Wall. 116, 17 L.Ed. 571. But a full examination of the opinion of the court shows that its judgment was based upon the ground that the foreclosure was valid, without reference to the statute of 1857, because the method pursued was in strict conformity to the mode of foreclosure authorized, when the contract was made by the laws then in existence. Now, if the state court was right in their view of the law as it stood when the contract was made, it is obvious that the mere fact that a new law was made does not impair the obligation of the contract. And it is also clear that we cannot inquire whether the supreme judicial court of Maine was right in that opinion. Here is, therefore, a clear case of a sufficient ground on which the validity of the decree of the state court could rest, even if it had been in error as to the effect of the act of 1857 in impairing the obligation of the contract. And when there is such distinct and sufficient ground for the support of the judgment of the state court, we cannot take jurisdiction, because we could not reverse the case, though the federal question was decided erroneously in the court below against the plaintiff in error. *Rector v. Ashley*, 6 Wall. 142, 18 L.Ed. 733; *Klinger v. Missouri*, 13 Wall. 257, 20 L.Ed. 635; *Steines v. Franklin County*, 14 Wall. 15, 20 L.Ed. 846. The writ of error must therefore be dismissed for want of jurisdiction." *Id.*, pages 25, 26.

The result of the authorities, applying to cases of contracts the settled rules that in order to give this court jurisdiction of a writ of error to a state court, a federal question must have been, expressly or in effect, decided by that court, and, therefore, that when the record shows that a federal question and another ques-

tion were presented to that court and its decision turned on the other question only, this court has no jurisdiction, may be summed up as follows: When the state court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction. When the existence and the construction of a contract are undisputed, and the state court upholds a subsequent law, on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction. When the state court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract; and, if it is of opinion that it did not confer the rights affirmed by the state court, and therefore its obligation was not impaired by the subsequent law, may on that ground affirm the judgment. So, when the state court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld. But when the state court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction. In the present case, the supreme court of Louisiana did not, and the plaintiff in error does not pretend that it did, give any effect to the provision of the Constitution of 1879 abolishing monopolies. Its judgment was based wholly upon the general law of the state, and upon the construction and effect of the charter from the legislature to the plaintiff company, and of the license from the city council to the defendant company, and in no degree upon the Constitution or any law of the state subsequent to the plaintiff's charter. \* \* \*

Case dismissed for want of jurisdiction.

## NOTE

1. Change in the obligations of a contract resulting from a change in judicial decision occurring after a contract was entered into do not violate the contract clause, *Rooker v. Fidelity Trust Co.*, 261 U.S. 114, 43 S.Ct. 288, 67 L.Ed. 556 (1923); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 44 S.Ct. 197, 68 L.Ed. 382 (1924); even though it involves a change in the construction of a statute in existence when the contract was entered into, *Fleming v. Fleming*, 264 U.S. 29, 44 S.Ct. 246, 68 L.Ed. 547 (1924). See W. F. Dodd, *Impairment of the Obligation of Contracts by State Judicial Decisions*, 4 Ill.L.Rev. 155, 327 (1910).

2. The Supreme Court will follow the state court's decision on the existence and construction of a contract unless that decision is so unreasonable as to indicate an attempt to evade the contract clause, *Hale v. Iowa State Board of Assessment & Review*, 302 U.S. 95, 58 S.Ct. 102, 82 L.Ed. 72 (1937); *Atlantic Coast Line R. Co. v. Phillips*, 332 U.S. 168, 67 S.Ct. 1584, 91 L.Ed. 1977 (1947).

3. For an exhaustive study and treatment of the contract clause, see R. L. Hale, *The Supreme Court and the Contract Clause*, 57 Harv.L.Rev. 512, 621, 852 (1944).

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HOME BLDG. & LOAN ASS'N v. BLAISDELL.

Supreme Court of the United States, 1934. 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

Appellant contests the validity of chapter 339 of the Laws of Minnesota of 1933, p. 514, approved April 18, 1933, called the Minnesota Mortgage Moratorium Law, as being repugnant to the contract clause (article 1, § 10, U.S.C.A.Const. art. 1, § 10) and the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution, U.S.C.A.Const. Amend. 14. The statute was sustained by the Supreme Court of Minnesota (189 Minn. 422, 249 N.W. 334, 86 A.L.R. 1507; 189 Minn. 448, 249 N.W. 893), and the case comes here on appeal.

The act provides that, during the emergency declared to exist, relief may be had through authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended. The act does not apply to mortgages subsequently made nor to those made previously which shall be extended for a period ending more than a year after the passage of the act (part 1, § 8). There are separate provisions in part 2 relating to homesteads, but these are to apply "only to cases not

entitled to relief under some valid provision of Part One." The act is to remain in effect "only during the continuance of the emergency and in no event beyond May 1, 1935." No extension of the period for redemption and no postponement of sale is to be allowed which would have the effect of extending the period of redemption beyond that date. Part 2, § 8.

The act declares that the various provisions for relief are severable; that each is to stand on its own footing with respect to validity. Part 1, § 9. We are here concerned with the provisions of part 1, § 4, authorizing the district court of the county to extend the period of redemption from foreclosure sales "for such additional time as the court may deem just and equitable," subject to the above-described limitation. The extension is to be made upon application to the court, on notice, for an order determining the reasonable value of the income on the property involved in the sale, or, if it has no income, then the reasonable rental value of the property, and directing the mortgagor "to pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, mortgage \* \* \* indebtedness at such times and in such manner" as shall be determined by the court. The section also provides that the time for redemption from foreclosure sales theretofore made, which otherwise would expire less than thirty days after the approval of the act, shall be extended to a date thirty days after its approval, and application may be made to the court within that time for a further extension as provided in the section. By another provision of the act, no action, prior to May 1, 1935, may be maintained for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of the act has expired. Prior to the expiration of the extended period of redemption, the court may revise or alter the terms of the extension as changed circumstances may require. Part 1, § 5.

Invoking the relevant provision of the statute, appellees applied to the district court of Hennepin county for an order extending the period of redemption from a foreclosure sale. \* \* \*

The court entered its judgment extending the period of redemption to May 1, 1935, subject to the condition that the appellees should pay to the appellant \$40 a month through the extended period from May 2, 1933; that is, that in each of the months of August, September, and October, 1933, the payments should be \$80, in two installments, and thereafter \$40 a month, all these amounts to go to the payment of taxes, insurance, interest, and mortgage indebtedness. It is this judgment, sustained by the Supreme Court of the state on the authority of its former

opinion, which is here under review. 189 Minn. 448, 249 N.W. 893. \* \* \*

We approach the questions thus presented upon the assumption made below, as required by the law of the state, that the mortgage contained a valid power of sale to be exercised in case of default; that this power was validly exercised; that under the law then applicable the period of redemption from the sale was one year, and that it has been extended by the judgment of the court over the opposition of the mortgagee-purchaser; and that, during the period thus extended, and unless the order for extension is modified, the mortgagee-purchaser will be unable to obtain possession, or to obtain or convey title in fee, as he would have been able to do had the statute not been enacted. The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains. The statute does not affect the validity of the sale or the right of a mortgagee-purchaser to title in fee, or his right to obtain a deficiency judgment, if the mortgagor fails to redeem within the prescribed period. Aside from the extension of time, the other conditions of redemption are unaltered. While the mortgagor remains in possession, he must pay the rental value as that value has been determined, upon notice and hearing, by the court. The rental value so paid is devoted to the carrying of the property by the application of the required payments to taxes, insurance, and interest on the mortgage indebtedness. While the mortgagee-purchaser is debarred from actual possession, he has so far as rental value is concerned, the equivalent of possession during the extended period.

In determining whether the provision for this temporary and conditional relief exceeds the power of the state by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have

always been, and always will be, the subject of close examination under our constitutional system. \* \* \*

The inescapable problems of construction have been: What is a contract? What are the obligations of contracts? What constitutes impairment of these obligations? What residuum of power is there still in the States, in relation to the operation of contracts, to protect the vital interests of the community? Questions of this character, "of no small nicety and intricacy, have vexed the legislative halls, as well as the judicial tribunals, with an uncounted variety and frequency of litigation and speculation." Story on the Constitution, § 1375. \* \* \*

Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." *Stephenson v. Binford*, 287 U.S. 251, 276, 53 S.Ct. 181, 189, 77 L.Ed. 288. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court. \* \* \*

The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. In *Manigault v. Springs*, 199 U.S. 473, 26 S.Ct. 127, 50 L.Ed. 274, riparian owners in South Carolina had made a contract for a clear passage through a creek by the removal of existing obstructions. Later, the Legislature of the state, by virtue of its broad authority to make public improvements, and in order to increase the taxable value of the lowlands which would be drained, authorized the construction of a dam across the creek. The Court sustained the statute upon the ground that the private interests were subservient to the public right. The Court said (*Id.*, page 480 of 199 U. S., 26 S.Ct. 127, 130): "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered

into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals." A statute of New Jersey (P.L.N.J.1905, p. 461, 4 Comp.St.1910, p. 5794, R.S.1937, 58:3-1 et seq.) prohibiting the transportation of water of the state into any other state was sustained against the objection that the statute impaired the obligation of contracts which had been made for furnishing such water to persons without the state. Said the Court, by Mr. Justice Holmes (*Hudson County Water Co. v. McCarter*, 209 U.S. page 357, 28 S.Ct. 529, 531, 52 L.Ed. 828, 14 Ann.Cas. 560): "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter." The general authority of the Legislature to regulate, and thus to modify, the rates charged by public service corporations, affords another illustration. *Stone v. Farmers' Loan & Trust Company*, 116 U.S. 307, 325, 326, 6 S.Ct. 334, 388, 1191, 29 L.Ed. 636. In *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U.S. 372, 39 S.Ct. 117, 63 L.Ed. 309, 9 A.L.R. 1420, a statute fixing reasonable rates, to be charged by a corporation for supplying electricity to the inhabitants of a city, superseded lower rates which had been agreed upon by a contract previously made for a definite term between the company and a consumer. The validity of the statute was sustained. To the same effect are *Producers' Transportation Co. v. Railroad Commission*, 251 U.S. 228, 232, 40 S.Ct. 131, 64 L.Ed. 239, and *Sutter Butte Canal Co. v. Railroad Commission*, 279 U.S. 125, 138, 49 S.Ct. 325, 73 L.Ed. 637. Similarly, where the protective power of the state is exercised in a manner otherwise appropriate in the regulation of a business, it is no objection that the performance of existing contracts may be frustrated by the prohibition of injurious practices. *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 363, 36 S.Ct. 370, 60 L.Ed. 679, L.R.A.1917A, 421, Ann.Cas.1917B, 455. See, also, *St. Louis Poster Advertising Co. v. St. Louis*, 249 U.S. 269, 274, 39 S.Ct. 274, 63 L.Ed. 599.

The argument is pressed that in the cases we have cited the obligation of contracts was affected only incidentally. This argument proceeds upon a misconception. The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. Another argument, which comes more

closely to the point, is that the state power may be addressed directly to the prevention of the enforcement of contracts only when these are of a sort which the Legislature in its discretion may denounce as being in themselves hostile to public morals, or public health, safety, or welfare, or where the prohibition is merely of injurious practices; that interference with the enforcement of other and valid contracts according to appropriate legal procedure, although the interference is temporary and for a public purpose, is not permissible. This is but to contend that in the latter case the end is not legitimate in the view that it cannot be reconciled with a fair interpretation of the constitutional provision.

Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the state to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. See *American Land Co. v. Zeiss*, 219 U.S. 47, 31 S.Ct. 200, 55 L.Ed. 82. The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts as is the reservation of state power to protect the public interest in the other situations to which we have referred. And, if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood, or earthquake, that power cannot be said to be nonexistent when the urgent public need demanding such relief is produced by other and economic causes. \* \* \*

Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application. When we consider the contract clause and the decisions which have expounded it in harmony with the essential reserved power of the states to protect the security of

their peoples, we find no warrant for the conclusion that the clause has been warped by these decisions from its proper significance or that the founders of our government would have interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day. The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution. With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the states to protect their fundamental interests. This development is a growth from the seeds which the fathers planted. It is a development forecast by the prophetic words of Justice Johnson in *Ogden v. Saunders*, 12 Wheat. 213, 6 L.Ed. 606, already quoted. And the germs of the later decisions are found in the early cases of the *Charles River Bridge*, 11 Pet. 420, 9 L.Ed. 773 and the *West River Bridge*, 6 How. 507, 12 L.Ed. 535, *supra*, which upheld the public right against strong insistence upon the contract clause. The principle of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the state is read into all contracts, and there is no greater reason for refusing to apply this principle to Minnesota mortgages than to New York leases.

Applying the criteria established by our decisions, we conclude:

1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community. The declarations of the existence of this emergency by the Legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis. *Block v. Hirsh*, *supra*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165. The finding of the Legislature and state court has support in the facts of which we take judicial notice. *Atchison, T. & S. F. Rwy. Co. v. United States*, 284 U.S. 248, 260, 52 S.Ct. 146, 76 L.Ed. 273. It is futile to attempt to make a comparative estimate of the seriousness of the emergency shown in the leasing cases from New York and of the emergency disclosed here. The particular facts differ, but that there were in Minnesota conditions urgently demanding relief, if power existed to give it, is beyond cavil. As the Supreme Court of Minnesota said (289 Minn. 422, 249 N.W. 334, 337, 86 A.L.R. 1507), the economic emergency which threatened "the loss of homes and lands which furnish those in possession the necessary shelter and means of subsistence" was a "potent cause" for the enactment of the statute.

2. The legislation was addressed to a legitimate end; that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society.

3. In view of the nature of the contracts in question—mortgages of unquestionable validity—the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions.

4. The conditions upon which the period of redemption is extended do not appear to be unreasonable. The initial extension of the time of redemption for thirty days from the approval of the act was obviously to give a reasonable opportunity for the authorized application to the court. As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor during the extended period is not ousted from possession, but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness. The mortgagee-purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession. Also important is the fact that mortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as insurance companies, banks, and investment and mortgage companies. These, and such individual mortgagees as are small investors, are not seeking homes or the opportunity to engage in farming. Their chief concern is the reasonable protection of their investment security. It does not matter that there are, or may be, individual cases of another aspect. The Legislature was entitled to deal with the general or typical situation. The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief.

In the absence of legislation, courts of equity have exercised jurisdiction in suits for the foreclosure of mortgages to fix the time and terms of sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or inadequacy of price was so gross as to shock the conscience. The "equity of redemption" is the creature of equity. While courts of equity

could not alter the legal effect of the forfeiture of the estate at common law on breach of condition, they succeeded, operating on the conscience of the mortgagee, in maintaining that it was unreasonable that he should retain for his own benefit what was intended as a mere security, that the breach of condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest and costs, notwithstanding the forfeiture at law. This principle of equity was victorious against the strong opposition of the common-law judges, who thought that by "the Growth of Equity on Equity the Heart of the Common Law is eaten out." The equitable principle became firmly established, and its application could not be frustrated even by the engagement of the debtor entered into at the time of the mortgage, the courts applying the equitable maxim "once a mortgage, always a mortgage, and nothing but a mortgage." Although the courts would have no authority to alter a statutory period of redemption, the legislation in question permits the courts to extend that period, within limits and upon equitable terms, thus providing a procedure and relief which are cognate to the historic exercise of the equitable jurisdiction. If it be determined, as it must be, that the contract clause is not an absolute and utterly unqualified restriction of the state's protective power, this legislation is clearly so reasonable as to be within the legislative competency.

5. The legislation is temporary in operation. It is limited to the exigency which called it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts.

We are of the opinion that the Minnesota statute as here applied does not violate the contract clause of the Federal Constitution. Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned.

What has been said on that point is also applicable to the contention presented under the due process clause. *Block v. Hirsh*, supra. \* \* \*

Judgment affirmed.

[Mr. Justice SUTHERLAND dissented in an opinion in which Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, and Mr. Justice BUTLER concurred.]

## NOTE

1. The economic conditions that led to the moratory legislation sustained in the reported case also produced legislation greatly curtailing the mortgage creditor's rights with respect to his right to a deficiency judgment. Such legislation has been invariably sustained by the Supreme Court, *Richmond Mtge. & Loan Co. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 57 S.Ct. 338, 81 L.Ed. 552 (1937); *Honeyman v. Jacobs*, 306 U.S. 539, 59 S.Ct. 702, 83 L.Ed. 972 (1939); *Honeyman v. Hanan*, 302 U.S. 375, 58 S.Ct. 273, 82 L.Ed. 312 (1937); *Gelpert v. Nat. City Bank of N. Y.*, 313 U.S. 321, 61 S.Ct. 898, 85 L.Ed. 1299 (1941). While the contract clause is not applicable to Congress, federal legislation to protect farm debtors was first held to violate the due process clause of the Fifth Amendment, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593 (1935); but later sustained after some amendments intended to protect the creditor more adequately than before, *Wright v. Vinton Branch of Mountain Trust Bank of Roanoke*, 300 U.S. 440, 57 S.Ct. 556, 81 L.Ed. 736 (1937). See C. Bunn, *The Impairment of Contracts: Mortgage and Insurance Moratoria*, 1 U.Chicago L.Rev. 249 (1934).

2. The first comprehensive consideration by the Supreme Court of what constituted the obligation of a contract was in *Ogden v. Saunders*, 12 Wheat. 213, 6 L.Ed. 606 (1827). In Mr. Justice Washington's opinion therein he stated that "it is the law which binds the parties to perform their agreement. \* \* \* It is, then, the municipal law of the state, whether that be written or unwritten, which is emphatically the law of the contract made within the state, and must govern it throughout, wherever its performance is sought to be enforced. It forms, in my humble opinion, a part of the contract, and travels with it wherever the parties to it may be found." This position was denied by Chief Justice Marshall in his dissenting opinion in that case in the course of which he said: "If one law enters into all subsequent contracts, so does every other law which relates to the subject. A legislative act, then, declaring that all contracts should be subject to legislative control and should be discharged as the legislature might prescribe, would become a component part of every contract and be one of its conditions." Cf. this theory of Chief Justice Marshall with that of Chief Justice Hughes in the reported case that "the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." See *Sliesberg v. New York Life Ins. Co.*, 244 N.Y. 482, 155 N.E. 749 (1927).

3. On what is a contract see P. G. Kauper, *What is a Contract Under the Contracts Clause of the Federal Constitution*, 31 Mich. L.Rev. 187 (1933).

## EAST NEW YORK SAVINGS BANK v. HAHN.

Supreme Court of the United States, 1945.  
326 U.S. 230, 66 S.Ct. 69, 90 L.Ed. 34.

Mr. Justice FRANKFURTER delivered the opinion of the Court.

This was an action begun in 1944 to foreclose a mortgage on real property in the City of New York for non-payment of principal that had become due in 1924. The trial court held that the foreclosure proceeding was barred by the applicable New York Moratorium Law. 182 Misc. 863, 51 N.Y.S.2d 496. This Law, Chapter 93 of the Laws of New York of 1943, extended for another year legislation first enacted in 1933, whereby the right of foreclosure for default in the payment of principal was suspended for a year as to mortgages executed prior to July 1, 1932. Year by year (except in 1941 when an extension for two years was made) the 1933 statute was renewed for another year. The New York Court of Appeals, one judge dissenting, affirmed the trial court's judgment. 293 N.Y. 622, 59 N.E.2d 625. Upon claim duly made below that the Moratorium Law of 1943 was repugnant to the Contract Clause of the Constitution of the United States, Art. I, § 10, the case is here on appeal under § 237(a) of the Judicial Code, 28 U.S.C. § 334(a), 28 U.S.C.A. § 344(a). The validity of the statute is likewise challenged under the Fourteenth Amendment but too feebly to merit consideration.

Since *Home Bldg. & L. Ass'n v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481, there are left hardly any open spaces of controversy concerning the constitutional restrictions of the Contract Clause upon moratory legislation referable to the depression. The comprehensive opinion of Mr. Chief Justice Hughes in that case cut beneath the skin of words to the core of meaning. After a full review of the whole course of decisions expounding the Contract Clause—covering almost the life of this Court—the Chief Justice, drawing on the early insight of Mr. Justice Johnson in *Ogden v. Saunders*, 12 Wheat. 213, 286, 6 L.Ed. 606, as reinforced by later decisions cast in more modern terms, e.g., *Manigault v. Springs*, 199 U.S. 473, 480, 26 S.Ct. 127, 130, 50 L.Ed. 274; *Marcus Brown Co. v. Feldman*, 256 U.S. 170, 198, 41 S.Ct. 465, 466, 65 L.Ed. 877, put the Clause in its proper perspective in our constitutional framework. The *Blaisdell* case and decisions rendered since (e.g., *Honeyman v. Jacobs*, 306 U.S. 539, 59 S.Ct. 702, 83 L.Ed. 972; *Veix v. Sixth Ward Ass'n*, 310 U.S. 32,

60 S.Ct. 792, 84 L.Ed. 1061; *Gelfert v. National City Bank*, 313 U.S. 221, 61 S.Ct. 898, 85 L.Ed. 1299, 133 A.L.R. 1467; *Faitoute Co. v. Asbury Park*, 316 U.S. 502, 62 S.Ct. 1129, 86 L.Ed. 1629), yield this governing constitutional principle: when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State "to safeguard the vital interests of its people," 290 U.S. at page 434, 54 S.Ct. at page 239, 78 L.Ed. 413, 88 A.L.R. 1481, is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment.

The formal mode of reasoning by means of which this "protective power of the state," 290 U.S. at page 440, 54 S.Ct. at page 241, 78 L.Ed. 413, 88 A.L.R. 1481, is acknowledged is of little moment. It may be treated as an implied condition of every contract and, as such, as much part of the contract as though it were written into it, whereby the State's exercise of its power enforces, and does not impair, a contract. A more candid statement is to recognize, as was said in *Manigault v. Springs*, supra, that the power "which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the \* \* \* general welfare of the people, and is paramount to any rights under contracts between individuals." 199 U.S. at page 480, 26 S.Ct. at page 130, 50 L.Ed. 274. Once we are in this domain of the reserve power of a State we must respect the "wide discretion on the part of the legislature in determining what is and what is not necessary." *Id.* So far as the constitutional issue is concerned, "the power of the State when otherwise justified," *Marcus Brown Co. v. Feldman*, 256 U.S. 170, 198, 41 S.Ct. 465, 466, 65 L.Ed. 877, is not diminished because a private contract may be affected.

Applying these considerations to the immediate situation brings us to a quick conclusion. In 1933, New York began a series of moratory enactments to counteract the virulent effects of the depression upon New York realty which have been spread too often upon the records of this Court to require even a summary. Chapter 793 of the Laws of 1933 gave a year's grace against foreclosures of mortgages, but it obligated the mortgagor to pay taxes, insurance, and interest. The validity of the statute was sustained in *Klinke v. Samuels*, 264 N.Y. 144, 190 N.E. 324. The moratorium has been extended from year to year. When the 1937 reenactment was questioned, the New York Court of Appeals again upheld the legislation. *Maguire & Co. v. Lent & Lent, Inc.*, 277 N.Y. 694, 14 N.E.2d 629. This decision was rendered after a joint legislative committee had made a thorough study and

recommended continuance of the moratorium. New York Legislative Document (1938) No. 58. In 1941, the Legislature reflected some changes in economic conditions by requiring amortization of the principal at the rate of 1% per annum, beginning with July 1, 1942. The same legislature established another joint legislative committee to review once more the New York mortgage situation. "After a most exhaustive study of the moratorium," a report was submitted recommending its extension for another year. New York Legislative Document (1942) No. 45. The Governor of New York urged such legislation (New York Legislative Document (1943) No. 1, p. 9) and the Law now under attack was enacted. It is relevant to note that the New York Legislature in subsequent extensions of the moratorium again took note of changed economic conditions by increasing the amortization rate to 2% in 1944 (L.1944, C. 562) and to 3% in 1945 (L. 1945, C. 378).

Appellant asks us to reject the judgment of the joint legislative committee, of the Governor, and of the Legislature, that the public welfare, in the circumstances of New York conditions, requires the suspension of mortgage foreclosures for another year. On the basis of expert opinion, documentary evidence, and economic arguments of which we are to take judicial notice, it urges such a change in economic and financial affairs in New York as to deprive of all justification the determination of New York's legislature of what New York's welfare requires. We are invited to assess not only the range and incidence of what are claimed to be determining economic conditions insofar as they affect the mortgage market—bank deposits and war savings bonds; increased payrolls and store sales; available mortgage money and rise in real estate values—but also to resolve controversy as to the causes and continuity of such improvements, namely the effect of the war and of its termination, and similar matters. Merely to enumerate the elements that have to be considered shows that the place for determining their weight and their significance is the legislature not the judiciary. Unlike *Worthen Co. ex rel. Board v. Kavanaugh*, 295 U.S. 56, 60, 55 S.Ct. 555, 557, 79 L.Ed. 1298, 97 A.L.R. 905, here there was no "studied indifference to the interests of the mortgagee or to his appropriate protection." Here the Legislature was not even acting merely upon the pooled general knowledge of its members. The whole course of the New York moratorium legislation shows the empiric process of legislation at its fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of re-

sponsible forecasts. The New York Legislature was advised by those having special responsibility to inform it that "the sudden termination of the legislation which has dammed up normal liquidation of these mortgages for more than eight years might well result in an emergency more acute than that which the original legislation was intended to alleviate." New York Legislative Document (1942) No. 45, p. 25. It would indeed be strange if there were anything in the Constitution of the United States which denied the State the power to safeguard its people against such dangers. There is nothing. Justification for the 1943 enactment is not negatived because the factors that induced and constitutionally supported its enactment were different from those which induced and supported the moratorium statute of 1933.

It only remains to say that in *Chastleton Corporation v. Sinclair*, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841, which was strongly pressed on us, the Court dealt with quite a different situation. The differentiating factors are too glaring to require exposition.

Judgment affirmed.

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### FLETCHER v. PECK.

Supreme Court of United States, 1810. 6 Cranch 87, 3 L.Ed. 162.

[Error to the United States Circuit Court for Massachusetts. Fletcher brought an action of covenant in that court against Peck, and, upon the facts and pleadings stated in the opinion below, the court gave judgment for Peck upon the third count, overruling a demurrer to Peck's plea thereto.]

Mr. Chief Justice MARSHALL. \* \* \* This suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the state of Georgia, the contract for which was made in the form of a bill passed by the legislature of that state. \* \* \*

The fourth covenant in the deed is, that the title to the premises has been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the state of Georgia.

The third count recites the undue means practised on certain members of the legislature, as stated in the second count, and then alleges that, in consequence of these practices and of other causes, a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the state to the lands it contained. The count proceeds to recite at large this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void.

After protesting as before that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice.

To this plea there is a demurrer and joinder. \* \* \*

In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferable; and those who purchased parts of it were not stained by that guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well-known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held? The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they

originally vested is a fact, and cannot cease to be a fact. When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community. \* \* \*

The Constitution of the United States declares that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. U.S.C.A.Const. art. 1, § 10. Does the case now under consideration come within this prohibitory section of the Constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract? A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the Constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed. Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each state.

No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both. In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the state may enter?

The state legislatures can pass no ex post facto law. An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making that distinction. This rescinding act would have the effect of an ex post facto law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an ex post facto law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

The argument in favor of presuming an intention to except a case, not excepted by the words of the Constitution, is susceptible of some illustration from a principle originally engrafted in that instrument, though no longer a part of it. The Constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract, was suable in the courts of the United States for that violation. Would it have been a defence in such a suit to say that the state had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defence could be set up. And yet, if a state is neither restrained by the general principles of our political institutions, nor by the words of the Constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the Constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

\* \* \*

Judgment affirmed.

Mr. Justice JOHNSON [dissenting on two points]. \* \* \* Whether the words, "acts impairing the obligation of contracts," can be construed to have the same force as must have been given to the words "obligation and *effect* of contracts," is the difficulty in my mind.

There can be no solid objection to adopting the technical definition of the word "contract," given by Blackstone. The etymology, the classical signification, and the civil-law idea of the word, will all support it. But the difficulty arises on the word "obligation," which certainly imports an existing moral or physical necessity. Now a grant or conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract, is *functus officio* the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done. \* \* \*

## NOTE

1. For a relatively recent case in which the contract clause was successfully invoked to protect the title of a purchaser from the state of tax-forfeited lands against effects of the repeal of a statute enacted to assure such persons of obtaining a clear title, see *Wood & Knowlton v. Lovett*, 313 U.S. 362, 61 S.Ct. 983, 85 L.Ed. 1404 (1941).

2. The relation between a state, or one of its political subdivisions, and their officials is not deemed one of contract protected by the contract clause, *Butler v. Pennsylvania*, 10 How. 402, 13 L.Ed. 472 (1850). Nor are the relations between a state and its political subdivisions deemed to be such, *Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923).

3. The contracts between a state's subordinate political subdivisions and private persons occupy a peculiar status under the contract clause. The rights of the private party are, but those of such political subdivision are not, within the protection of that clause; see *Georgia Ry. & Power Co. v. Decatur*, 262 U.S. 432, 43 S.Ct. 613, 67 L.Ed. 1065 (1923); *Detroit United Ry. v. Michigan*, 242 U.S. 238, 37 S.Ct. 87, 61 L.Ed. 268 (1916); *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 39 S.Ct. 526, 63 L.Ed. 1054 (1919). See R. J. Smith, *The Judicial Interpretation of Public Utility Franchises*, 39 *Yale L.Jour.* 957 (1930); C. K. Burdick, *Regulating Franchise Rates*, 29 *Yale L.Jour.* 589 (1920).

4. The extent to which state legislation dealing with tenure and pensions of public school teachers become a term of their employment contract is extensively discussed in *Phelps v. Board of Education, etc.*, 300 U.S. 319, 57 S.Ct. 483, 81 L.Ed. 674 (1937); *Dodge v. Board of Education*, 302 U.S. 74, 58 S.Ct. 98, 82 L.Ed. 57 (1937); *State v. Brand*, 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685 (1938).

5. See M. H. Merrill, *Application of the Obligation of Contract Clause to State Promises*, 80 *U.Pa.L.Rev.* 639 (1932).

## NEW ORLEANS GAS-LIGHT CO. v. LOUISIANA LIGHT CO.

Supreme Court of United States, 1885. 115 U.S. 650, 6 S.Ct. 252,  
29 L.Ed. 516.

[Appeal from the United States Circuit Court for the Eastern District of Louisiana. In 1875 the New Orleans Gas Company became the owner of an exclusive legislative grant to supply gas in New Orleans by pipes in the street for 50 years from that date. The state Constitution of 1879 purported to abolish this monopoly provision, and in 1881 the Louisiana Light Company was organized under a general law and authorized by the city of New Orleans to supply gas through street pipes. The New Orleans Company sought to enjoin this in the above-named court. A demurrer to the bill was sustained on the ground of the plaintiff's not being properly incorporated, and this appeal was taken. The Supreme Court held that the plaintiff was properly incorporated and then dealt with the validity of the plaintiff's alleged exclusive contract.]

Mr. Justice HARLAN. \* \* \* The manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character. Under proper management the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community. It also holds important relations to the public through the facilities furnished, by the lighting of streets with gas, for the detection and prevention of crime. \* \* \* For these reasons, and the necessity of uniform regulations for the manufacture and distribution of gas for use by the community, we are of opinion that the supplying of it to the city of New Orleans, and to its inhabitants, by the means designated in the legislation of Louisiana, was an object for which the state could rightfully make provision. \* \* \* Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business open as of common right to all, upon terms of equality; for the right to dig up the streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the state, or by the municipal government of that city acting under legislative authority. Dill.Mun.Corp., 3d Ed., § 691; State v. Cincinnati Gas Co., 18 Ohio St. 262. See, also, Boston v. Richardson, 13 Allen, Mass., 146. \* \* \* It will therefore be

assumed, in the further consideration of this case, that the charter of the Crescent City Gas-Light Company,—to whose rights and franchises the present plaintiff has succeeded,—so far as it created a corporation with authority to manufacture gas and to distribute the same by means of pipes, mains, and conduits, laid in the streets and other public ways of New Orleans, constituted \* \* \* a contract \* \* \* within the provision of the Constitution. \* \* \*

But it is earnestly insisted that, since the supplying of New Orleans and its inhabitants with gas has relation to the public comfort, and, in some sense, to the public health and the public safety, and, for that reason, is an object to which the police power extends, it was not competent for one legislature to limit or restrict the power of a subsequent legislature, in respect to those subjects. It is, consequently, claimed that the state may at pleasure recall the grant of exclusive privileges to the plaintiff; and that no agreement by her, upon whatever consideration, in reference to a matter connected in any degree with the public comfort, the public health, or the public safety, will constitute a contract the obligation of which is protected against impairment by the national Constitution, U.S.C.A.Const. art. 1, § 10. And this position is supposed by counsel to be justified by recent adjudications of this court in which the nature and scope of the police power have been considered. \* \* \* [Here follow references to the Slaughter-House Cases, 16 Wall. 36, 62, 21 L.Ed. 394, *Stone v. Mississippi*, 101 U.S. 814, 818, 25 L.Ed. 1079, *Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L.Ed. 23, and *Barbier v. Connolly*, 113 U.S. 27, 31, 5 S.Ct. 357, 28 L.Ed. 923—cases suggesting definitions of the “police power.”] Definitions of the police power must, however, be taken subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land. \* \* \*

That the police power, according to its largest definition, is restricted in its exercise by the national Constitution, is further shown by those cases in which grants of exclusive privileges respecting public highways and bridges over navigable streams have been sustained as contracts the obligations of which are fully protected against impairment by state enactments. \* \* \* [Here follow references to *Bridge Prop'rs v. Hoboken Co.*, 1 Wall. 116, 17 L.Ed. 571, *The Binghamton Bridge*, 3 Wall. 51, 18 L.Ed. 137, and other cases.] Numerous other cases could be cited as establishing the doctrine that the state may by contract restrict the exercise of some of its most important powers. We particularly refer to those in which it is held that an exemption from taxation,

for a valuable consideration at the time advanced, or for services to be thereafter performed, constitutes a contract within the meaning of the Constitution. *Asylum v. New Orleans*, 105 U.S. 368, 26 L.Ed. 1128; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495; *New Jersey v. Wilson*, 7 Cranch 166, 3 L.Ed. 303; *Bank of Ohio v. Knoop*, 16 How. 376, 14 L.Ed. 977; *Gordon v. Appeal Tax Courts*, 3 How. 133, 11 L.Ed. 529; *Wilmington R. R. v. Reid*, 13 Wall. 266, 20 L.Ed. 568; *Humphrey v. Pegues*, 16 Wall. 248, 249, 21 L.Ed. 326; *Farrington v. Tennessee*, 95 U.S. 689, 24 L.Ed. 558.

If the state can, by contract, restrict the exercise of her power to construct and maintain highways, bridges, and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation, by granting exemption from taxation to particular individuals and corporations,—it is difficult to perceive upon what ground we can deny her authority, when not forbidden by her own organic law, in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the state might undertake to perform either herself or by subordinate municipal agencies. The former adjudications of this court, upon which counsel mainly rely, do not declare any different doctrine, or justify the conclusion for which the defendant contends. \* \* [Here follows an examination of *Beer Co. v. Massachusetts*, 97 U.S. 25, 24 L.Ed. 989, *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 24 L.Ed. 1036, *Stone v. Mississippi*, 101 U.S. 814, 25 L.Ed. 1079, and *Butch. Un. Co. v. Cres. City Co.*, 111 U.S. 746, 4 S.Ct. 652, 28 L.Ed. 585.]

The principle upon which [these] decisions \* \* \* rest is that one legislature cannot so limit the discretion of its successors that they may not enact such laws as are necessary to protect the public health or the public morals. That principle, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of those cases that statutory authority, given by the state, to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others

The present case involves no such considerations. For, as we have seen, the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the state may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization for the promotion of the public convenience and the public safety. \* \* \* It is not our province to declare that the legislature unwisely exercised the discretion with which it was invested. Nor are we prepared to hold that the state was incapable—her authority in the premises not being, at the time, limited by her own organic law—of providing for supplying gas to one of her municipalities and its inhabitants by means of a valid contract with a private corporation of her own creation. \* \* \*

With reference to the contract in this case, it may be said that it is not, in any legal sense, to the prejudice of the public health or the public safety. It is none the less a contract because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for the grant of exclusive privileges to the plaintiff does not restrict the power of the state, or of the municipal government of New Orleans acting under authority for that purpose, to establish and enforce regulations, not inconsistent with the essential rights granted by plaintiff's charter, necessary for the protection of the public against injury, whether arising from the want of due care in the conduct of its business or, from an improper use of the streets in laying gas-pipes, or from the failure of the grantee to furnish gas of the required quality and amount. The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations. \* \* \*

The article in the state Constitution 1879 in relation to monopolies is not, in any legal sense, an exercise of the police power for the preservation of the public health, or the promotion of the pub-

lic safety; for the exclusiveness of a grant has no relation whatever to the public health, or to the public safety. These considerations depend upon the nature of the business or duty to which the grant relates, and not at all upon the inquiry whether a franchise is exercised by one rather than by many. The monopoly clause only evinces a purpose to reverse the policy previously pursued of granting to private corporations franchises accompanied by exclusive privileges, as a means of accomplishing public objects. \* \* \* If, in the judgment of the state, the public interests will be best subserved by an abandonment of the policy of granting exclusive privileges to corporations, other than railroad companies, in consideration of services to be performed by them for the public, the way is open for the accomplishment of that result with respect to corporations whose contracts with the state are unaffected by that change in her organic law. The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the company, under the state's power of eminent domain. *West River Bridge Co. v. Dix*, 6 How. 507, 12 L.Ed. 535, *ubi supra*; *Richmond, etc., R. Co., v. Louisa. R. Co.*, 13 How. 71, 83, 14 L.Ed. 55; *Boston Water-power Co. v. Boston & W. R. Corp.*, 23 Pick., Mass., 360, 393; *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray, Mass., 1, 35. In that way the plighted faith of the public will be kept with those who have made large investments upon the assurance by the state that the contract with them will be performed. \* \* \*

Decree reversed.

## NOTE

1. Courts have relied upon the principle that public grants are to be strictly construed against the grantee to protect the public interest against the evils of monopolistic grants; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L.Ed. 773 (1837); *Knoxville Water Co. v. Knoxville*, 200 U.S. 22, 26 S.Ct. 224, 50 L.Ed. 353 (1906); *Larson v. South Dakota*, 278 U.S. 429, 49 S.Ct. 196, 73 L.Ed. 441 (1929). But see *Vicksburg v. Vicksburg Waterworks Co.*, 202 U.S. 453, 26 S.Ct. 660, 50 L.Ed. 1102 (1906); *Superior Water Light & Power Co. v. City of Superior*, 263 U.S. 125, 44 S.Ct. 82, 68 L.Ed. 204 (1923).

2. It has been held that a state may contract away its power to fix public utility rates for limited periods, the precise duration of which is not defined, *Railroad Commission of California v. Los Angeles Ry. Corp.*, 280 U.S. 145, 50 S.Ct. 71, 74 L.Ed. 234 (1929).

3. One of the most important applications of the principle that public grants are contracts within the protection of the contract clause is the doctrine that the charters of private corporations

are such contracts, first enunciated in *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L.Ed. 629 (1819). The restrictive effects of this doctrine upon the states' power to regulate corporations was reduced by the "reserved power" doctrine which was based upon a suggestion made by Mr. Justice Story in his concurring opinion in the *Dartmouth College Case*. The practice of state legislatures to reserve the power of repealing and amending special charters granted by them, or the general corporation laws of the present day, gave the states a basis on which much regulatory legislation was sustained against objections based on the contract clause; see *Greenwood v. Union Freight R. Co.*, 105 U.S. 13, 26 L.Ed. 961 (1882); *Looker v. Maynard*, 179 U.S. 46, 21 S.Ct. 21, 45 L.Ed. 79 (1900); *Polk v. Mutual Reserve Fund Life Ass'n of N. Y.*, 207 U.S. 310, 28 S.Ct. 65, 52 L.Ed. 222 (1907). However, courts have always, and continue today, to recognize that there are limits on what can be done under those reserved powers imposed by both the contract clause and the due process clause of the Fourteenth Amendment; see *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 56 S.Ct. 408, 80 L.Ed. 575 (1936); *Coombes v. Getz*, 285 U.S. 434, 52 S.Ct. 435, 76 L.Ed. 866 (1932); *Superior Water, Light & Power Co. v. City of Superior*, 263 U.S. 125, 44 S.Ct. 82, 68 L.Ed. 204 (1923). The need for this doctrine has diminished, if not entirely disappeared, with the development and expansion of the principle that all contracts are made subject to reasonable exercises of the states' police powers; see *Veix v. 6th Ward Bldg. & Loan Ass'n of Newark, N. J.*, 310 U.S. 32, 60 S.Ct. 792, 84 L.Ed. 1061 (1940) for a case involving a statutory change in the rights of members which was sustained as a valid exercise of the police power instead of by invoking the reserved power to amend. See G. Ohlinger, *Some Comments on the Reserved Power to Alter, Amend and Repeal Corporate Charters*, 29 Mich.L.Rev. 432 (1931); W. C. Schmidt, *Constitutional Limitations on the Reserved Power to Alter Incidents of the Shareholder's Status in Private Corporations*, 21 St.L.L.Rev. 12 (1935); E. M. Dodd, *Dissenting Stockholders and Amendments to Corporate Charters*, 75 U.Pa.L.Rev. 585, 723 (1927).

## PIQUA BRANCH OF STATE BANK OF OHIO v. KNOOP.

Supreme Court of United States, 1853. 16 How. 369, 14 L.Ed. 977.

[Error to Ohio Supreme Court. An Ohio statute of 1845 authorized the incorporation of banks subject to the provisions of the act. It provided that each company accepting the act and complying therewith should pay 6 per cent. of its semi-annual profits to the state, in lieu of all taxes to which the company or its stockholders would otherwise be subject. The Piqua Bank was organized under this act in 1847, as a branch of the State Bank of Ohio. In 1851 a state statute purported to subject the capital stock, surplus, and contingent fund of banks in the state to the same taxation as other personal property. The state's suit against the Piqua Branch for taxes under the act of 1851 was sustained by the state courts, and this writ of error was taken.]

Mr. Justice McLEAN. \* \* \* The idea that a state, by exempting from taxation certain property, parts with a portion of its sovereignty, is of modern growth; and so is the argument that if a state may part with this in one instance it may in every other, so as to divest itself of the sovereign power of taxation. Such an argument would be as strong and as conclusive against the exercise of the taxing power. For if the legislature may levy a tax upon property, they may absorb the entire property of the taxpayer. The same may be said of every power where there is an exercise of judgment. \* \* \*

The assumption that a state, in exempting certain property from taxation, relinquishes a part of its sovereign power, is unfounded. The taxing power may select its objects of taxation; and this is generally regulated by the amount necessary to answer the purposes of the state. Now the exemption of property from taxation is a question of policy and not of power. A sound currency should be a desirable object to every government; and this in our country is secured generally through the instrumentality of a well-regulated system of banking. To establish such institutions as shall meet the public wants and secure the public confidence, inducements must be held out to capitalists to invest their funds. They must know the rate of interest to be charged by the bank, the time the charter shall run, the liabilities of the company, the rate of taxation, and other privileges necessary to a successful banking operation.

These privileges are proffered by the state, accepted by the stockholders, and in consideration funds are invested in the bank. Here is a contract by the state and the bank, a contract founded

upon considerations of policy acquired by the general interests of the community, a contract protected by the laws of England and America, and by all civilized states where the common or the civil law is established. \* \* \*

There is no constitutional objection to the exercise of the power to make a binding contract by a state. It necessarily exists in its sovereignty, and it has been so held by all the courts in this country. A denial of this is a denial of state sovereignty. It takes from the state a power essential to the discharge of its functions as sovereign. If it do not possess this attribute, it could not communicate it to others. There is no power possessed by it more essential than this. Through the instrumentality of contracts, the machinery of the government is carried on. Money is borrowed, and obligations given for payment. Contracts are made with individuals, who give bonds to the state. So in the granting of charters. If there be any force in the argument, it applies to contracts made with individuals, the same as with corporations. But it is said the state cannot barter away any part of its sovereignty. No one ever contended that it could.

A state, in granting privileges to a bank, with a view of affording a sound currency, or of advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose, of which it is the exclusive judge. Under such circumstances, a contract made for a specific tax, as in the case before us, is binding. This tax continues, although all other banks should be exempted from taxation. Having the power to make the contract, and rights becoming vested under it, it can no more be disregarded nor set aside by a subsequent legislature, than a grant for land. This act, so far from parting with any portion of the sovereignty, is an exercise of it. Can any one deny this power to the legislature? Has it not a right to select the objects of taxation and determine the amount? To deny either of these, is to take away state sovereignty.

It must be admitted that the state has the sovereign power to do this, and it would have the sovereign power to impair or annul a contract so made, had not the Constitution of the United States inhibited the exercise of such a power. The vague and undefined and indefinable notion, that every exemption from taxation or a specific tax, which withdraws certain objects from the general tax law, affects the sovereignty of the state, is indefensible.

There has been rarely, if ever, it is believed, a tax law passed by any state in the Union, which did not contain some exemp-

tions from general taxation. The act of Ohio of the 25th of March, 1851, in the fifty-eighth section, declared that "the provisions of that act shall not extend to any joint-stock company which now is, or may hereafter be organized, whose charter or act of incorporation shall have guaranteed to such company an exemption from taxation, or has prescribed any other as the exclusive mode of taxing the same." Here is a recognition of the principle now repudiated. In the same act, there are eighteen exemptions from taxation.

The federal government enters into an arrangement with a foreign state for reciprocal duties on imported merchandise, from the one country to the other. Does this affect the sovereign power of either state? The sovereign power in each was exercised in making the compact, and this was done for the mutual advantage of both countries. Whether this be done by treaty, or by law, is immaterial. The compact is made, and it is binding on both countries.

The argument is, and must be, that a sovereign state may make a binding contract with one of its citizens, and, in the exercise of its sovereignty, repudiate it. The Constitution of the Union, when first adopted, made states subject to the federal judicial power. Could a state, while this power continued, being sued for a debt contracted in its sovereign capacity, have repudiated it in the same capacity? In this respect the Constitution was very properly changed, as no state should be subject to the judicial power generally.

Much stress was laid on the argument, and in the decisions of the Supreme Court, on the fact that the banks paid no bonus for their charters, and that no contract can be binding which is not mutual. This is a matter which can have no influence in deciding the legal question. The state did not require a bonus, but other requisitions are found in the charter, which the legislature deemed sufficient, and this is not questionable by any other authority. The obligation is as strong on the state, from the privileges granted and accepted, as if a bonus had been paid.

\* \* \*

Judgment reversed.

[TANEY, C. J., gave a concurring opinion. CATRON, DANIEL, and CAMPBELL, JJ., gave dissenting opinions.]

## NOTE

1. It is difficult to understand why the Supreme Court has not applied to the taxing power of the states either the principle applied to the states' police power that it may be bargained away only within narrow bounds and for a limited period, *Railroad Commission of California v. Los Angeles Ry. Corp.*, 280 U.S. 145, 50 S.Ct. 71, 74 L.Ed. 234 (1929), or that applied to their power of eminent domain that it may not be bargained away at all, *Contributors to Pennsylvania Hospital v. Philadelphia*, 245 U.S. 20, 38 S.Ct. 35, 62 L.Ed. 124 (1917). See J. H. Zumbalen, *The Federal Constitution and Contract Exemptions from Taxation*, 17 St.L.L.Rev. 191 (1932).

2. The Supreme Court has construed the exemption contracts strictly against the grantee; *Jetton v. University of the South*, 208 U.S. 489, 28 S.Ct. 375, 52 L.Ed. 584 (1907); *New York ex rel. Clyde v. Gilchrist*, 262 U.S. 94, 43 S.Ct. 501, 67 L.Ed. 883 (1923); *Hale v. Iowa State Board of Assessment & Review*, 302 U.S. 95, 58 S.Ct. 102, 82 L.Ed. 72 (1937). Such contractual exemptions are generally construed to be personal privileges of the grantee, *Rochester Ry. Co. v. Rochester*, 205 U.S. 236, 27 S.Ct. 469, 51 L.Ed. 784 (1907). But see *New Jersey v. Wilson*, 7 Cranch 164, 3 L.Ed. 303 (1812), which held an exemption from property taxes to run with the land. It was later held lost by acquiescence in the taxation of the lands covered by it for a period of sixty years, *Given v. Wright*, 117 U.S. 648, 6 S.Ct. 907, 29 L.Ed. 1021 (1886).

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VON HOFFMAN v. QUINCY.

Supreme Court of United States, 1866. 4 Wall. 535, 18 L.Ed. 403.

[Error to the United States Circuit Court for the Southern District of Illinois. The city of Quincy, Ill., issued bonds in aid of railroads, under statutes authorizing the levy of a special tax upon property therein sufficient to pay the annual interest on such bonds and to be devoted to this purpose only. A subsequent statute reduced the city's taxing powers for debts and general expenses to  $\frac{1}{2}$  per cent., which would leave nothing for these bonds after paying current expenses. Von Hoffman petitioned in the above-named court for a mandamus to compel the city and its officers to levy taxes under the original acts and pay a judgment for interest on said bonds, which he had recovered against the city. Upon judgment for the city upon his petition, Von Hoffman took this writ of error.]

Mr. Justice SWAYNE. \* \* \* It is \* \* \* settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated

in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and indorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement. *Green v. Biddle*, 8 Wheat. 92, 5 L.Ed. 547; *Bronson v. Kinzie*, 1 How. 319, 11 L.Ed. 143; *McCracken v. Hayward*, 2 How. 612, 11 L.Ed. 397; *People v. Bond*, 10 Cal. 570; *Ogden v. Saunders*, 12 Wheat. 231, 6 L.Ed. 606.

In *Green v. Biddle*, the subject of laws which affect the remedy was elaborately discussed. The controversy grew out of a compact between the states of Virginia and Kentucky. It was made in contemplation of the separation of the territory of the latter from the former, and its erection into a state, and is contained in an act of the legislature of Virginia, passed in 1789, whereby it was provided "that all private rights and interests within" the district of Kentucky "derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state." By two acts of the legislature of Kentucky, passed respectively in 1797 and 1812, several new provisions relating to the consequences of a recovery in the action of ejectment—all eminently beneficial to the defendant, and onerous to the plaintiff—were adopted into the laws of that state. So far as they affected the lands covered by the compact, this court declared them void. It was said: "It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests."

In *Bronson v. Kinzie*, 1 How. 311, 11 L.Ed. 143, the subject was again fully considered. A mortgage was executed in Illinois containing a power of sale. Subsequently, an act of the legislature was passed which required mortgaged premises to be sold for not less than two-thirds of their appraised value, and allowed the mortgagor a year after the sale to redeem. It was held that the statute, by thus changing the pre-existing remedies, impaired the obligation of the contract, and was therefore void.

In *McCracken v. Hayward*, 2 How. 608, 11 L.Ed. 397, the same principle, upon facts somewhat varied, was again sustained and applied. A statutory provision that personal property should not be sold under execution for less than two-thirds of its appraised value was adjudged, so far as it affected prior contracts, to be void, for the same reason. \* \* \*

A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity. A statute declaring that the word "ton" should thereafter be held, in prior as well as subsequent contracts, to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtedment may be extinguished by a process of bankruptcy would involve its discharge, and a statute forbidding the sale of any of the debtor's property, under a judgment upon such a contract, would relate to the remedy.

It cannot be doubted, either upon principle or authority, that each of such laws passed by a state would impair the obligation of the contract, and the last-mentioned not less than the first. Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract "is the law which binds the parties to perform their agreement." *Sturges v. Crowninshield*, 4 Wheat. 157, 4 L.Ed. 529. The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. In *Green v. Biddle*, 8 Wheat. 84, 5 L.Ed. 547, it was said: "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. Upon this principle it is that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage."

"One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching, in any respect, on its obligation—dispensing with any part of its force." *Planters' Bank v. Sharp et al.*, 6 How. 327, 12 L.Ed. 447.

This has reference to legislation which affects the contract directly, and not incidentally or only by consequence.

The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial. The states may abolish it whenever they think proper. *Beers v. Haughton*, 9 Pet. 359, 9 L.Ed. 145; *Ogden v. Saunders*, 12 Wheat. 230, 6 L.Ed. 606; *Mason v. Haile*, 12 Wheat. 373, 6 L.Ed. 660; *Sturges v. Crowninshield*, 4 Wheat. 200, 4 L.Ed. 529. They may also exempt from sale, under execution, the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture. It is said: "Regulations of this description have always been considered in every civilized community as property belonging to the remedy, to be exercised by every sovereignty according to its own views of policy and humanity."

It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the Constitution, and to that extent void. *Bronson v. Kinzie*, 1 How. 311, 11 L. Ed. 143; *McCracken v. Hayward*, 2 How. 608, 11 L.Ed. 397.

If these doctrines were *res integræ* the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy—or, to speak more accurately, between the remedy and the other parts of the contract—might perhaps well be doubted. 1 *Kent's Commentaries* 456; *Sedgwick on Stat. and Cons. Law*, 652; Mr. Justice Washington's dissenting opinion in *Mason v. Haile*, 12 Wheat. 379, 6 L.Ed. 660. But they rest in this court upon a foundation of authority too firm to be shaken; and they are supported by such an array of judicial names that it is hard for the mind not to feel constrained to believe they are correct. The doctrine upon the subject established by the latest adjudications of this court render the distinction one rather of form than substance.

When the bonds in question were issued, there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist.

It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. *New Jersey v. Wilson*, 7 Cranch 166, 3 L.Ed. 303; *Dodge v. Woolsey*, 18 How. 331, 15 L.Ed. 401; *Piqua Branch v. Knoop*, 16 How. 369, 14 L.Ed. 977. It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other. *People v. Bond*, 10 Cal. 570; *Dominic v. Sayre*, 5 N.Y.Super.Ct. 555.

The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract but an abstract right, of no practical value, and render the protection of the Constitution a shadow and a delusion.

\* \* \*

Judgment reversed.

#### NOTE

1. A statute enacted after the bonds were issued, under which the bonds, or the interest coupons thereon, may be received at par in payment of taxes required to service the bonds, violates the contract clause, *Crummer v. Fort Pierce*, 2 F.Supp. 737 (D.C.Fla.1932); see also *Wall v. McNee*, 87 F.2d 768 (C.C.A.Fla.1937).

2. Legislatures have at times resorted to abolishing the municipal debtor in order to defeat the claims of municipal creditors. The Supreme Court has frequently held such devices violative of the contract clause, *Mount Pleasant v. Beckwith*, 100 U.S. 514, 25 L.Ed. 699 (1880); *Mobile v. Watson*, 116 U.S. 289, 6 S.Ct. 398, 29 L.Ed. 620 (1886); *Graham v. Folsom*, 200 U.S. 248, 26 S.Ct. 245, 50 L.Ed. 464 (1906). For a discussion of what municipal property may be applied to satisfy its debts, see *Meriwether v. Garrett*, 102 U.S. 472, 26 L.Ed. 197 (1880).

3. For discussion of validity of state municipal debt adjustment legislation, see *Faitoute Iron & Steel Co. v. Asbury Park*, 316 U.S. 502, 62 S.Ct. 1129, 86 L.Ed. 1629 (1942).

4. State legislation that so alters the remedies for the enforcement of private contracts as to leave the parties with practically no efficient remedy for its enforcement violates the contract clause, but a change in remedy not having that effect is valid; see *Bank of Minden v. Clement*, 256 U.S. 126, 41 S.Ct. 408, 65 L.Ed. 857 (1921); *W. B. Worthen Co. v. Thomas*, 292 U.S. 426, 54 S.Ct. 816, 78 L.Ed. 1344 (1934).

ROTTSCHAEFER MCB CONST.LAW

## CHAPTER 17

### LIMITATIONS ON THE TAXING POWER OF THE STATES

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#### A. MAGNANO CO. v. HAMILTON.

Supreme Court of the United States, 1934. 292 U.S. 40, 54 S.Ct. 599,  
78 L.Ed. 1109.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

Appellant assails as invalid a statute of the state of Washington which levies an excise tax of 15 cents per pound on all butter substitutes sold within the state (Laws Wash.1931, p. 77). Every distributor of such butter substitutes is required to file a duly acknowledged certificate with the Director of Agriculture, containing the name under which the distributor is transacting business within the state, and other specified information. Sale of any butter substitute is forbidden until such certificate is furnished. The distributor must render to the Director of Agriculture, on the 15th day of each month, a sworn statement of the number of pounds of butter substitutes sold during the preceding calendar month. Section 10 of the act provides that the tax shall not be imposed on butter substitutes when sold for exportation to any other state, territory, or nation; and any payment or the doing of any act which would constitute an unlawful burden upon the sale or distribution of butter substitutes in violation of the Constitution or laws of the United States is by section 13 excluded from the operation of the act. Violation of any provision of the act is denounced as a gross misdemeanor.

Appellant is a Washington corporation, and has for many years been engaged in importing and selling "Nucoa," a form of oleo-margarine. Prior to the passage of the act, it had derived a large annual net profit from sales made within the state. Since then, claiming the tax to be prohibitive, it has made no intra-state sales and no effort to do so. "Nucoa" is a nutritious and pure article of food, with a well-established place in the dietary.

Suit was brought to enjoin the enforcement of the act, on the ground that it violates the Federal Constitution in the following particulars: (1) That the imposition of the tax has the effect of

depriving complainant of its property without due process of law and of denying to it the equal protection of the laws, in violation of the Fourteenth Amendment, U.S.C.A.Const. amend. 14; (2) that the tax is not levied for a public purpose, but for the sole purpose of burdening or prohibiting the manufacture, importation, and sale of oleomargarine, in aid of the dairy industry; (3) that the act imposes an unjust and discriminatory burden upon interstate commerce; and (4) that it interferes with the power of Congress to levy and collect taxes, imposts, and excises, in violation of article 1, § 8, U.S.C.A.Const. art. 1, § 8.

The case came before a statutory court of three judges, under section 266 of the Judicial Code, as amended, 28 U.S.C. § 380, 28 U.S.C.A. § 380, first upon an application for an interlocutory injunction, which was denied, D.C., 2 F.Supp. 414, and subsequently for final hearing, at the conclusion of which that court made written findings of fact and conclusions of law, as required by Equity Rule 70½, 28 U.S.C.A. following section 723, and entered a final decree dismissing the bill. D.C., 2 F.Supp. 417.

First. We put aside at once all of the foregoing contentions, except the one relating to due process of law, as being plainly without merit. \* \* \*

Second. Except in rare and special instances, the due process of law clause contained in the Fifth Amendment, U.S.C.A.Const. amend. 5, is not a limitation upon the taxing power conferred upon Congress by the Constitution. *Brushaber v. Union Pac. R. R.*, 240 U.S. 1, 24, 36 S.Ct. 236, 60 L.Ed. 493. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 329, 21 S.Ct. 625, 45 L.Ed. 879; *Heiner v. Donnan*, 285 U.S. 312, 326, 52 S.Ct. 358, 76 L.Ed. 772. That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. Compare *McCulloch v. Maryland*, 4 Wheat. 316, 423, 4 L.Ed. 579; *Child Labor Tax Case*, 259 U.S. 20, 37 et seq., 42 S.Ct. 449, 66 L. Ed. 817, 21 A.L.R. 1432; *McCray v. United States*, 195 U.S. 27, 60, 24 S.Ct. 769, 49 L.Ed. 78, 1 Ann.Cas. 561; *Brushaber v. Union Pac. R. R.*, supra, 240 U.S. 24, 25, 36 S.Ct. 236, 60 L.Ed. 493, L.R.A.1917D, 414, Ann.Cas.1917B, 713; *Henderson Bridge Co. v. Henderson*, 173 U.S. 592, 614, 615, 19 S.Ct. 553, 43 L.Ed. 823; *Nichols v. Coolidge*, 274 U.S. 531, 542, 47 S.Ct. 710, 71 L.Ed. 1184, 52 A.L.R. 1081. Collateral purposes or motives of a Legislature in levying a tax of a kind within the reach of its law-

ful power are matters beyond the scope of judicial inquiry. *McCray v. United States*, supra, 195 U.S. 56–59, 24 S.Ct. 769, 49 L. Ed. 78, 1 Ann.Cas. 561. Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses (*Citizens' Sav. & Loan Association v. Topeka*, 20 Wall. 655, 663, 664, 22 L.Ed. 455; *McCray v. United States*, supra, 195 U.S. 56–58, 24 S.Ct. 769, 49 L.Ed. 78, 1 Ann.Cas. 561, and authorities cited; *Alaska Fish Co. v. Smith*, 255 U.S. 44, 48, 49, 41 S.Ct. 219, 65 L.Ed. 489; *Child Labor Tax Case*, supra, 259 U.S. 38, 40–43, 42 S.Ct. 449, 66 L.Ed. 817, 21 A.L.R. 1432), unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state. The present case does not furnish such a demonstration.

The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant; but that is precisely the point which was made in the attack upon the validity of the 10 per cent. tax imposed upon the notes of state banks involved in *Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L.Ed. 482. This court there disposed of it by saying that the courts are without authority to prescribe limitations upon the exercise of the acknowledged powers of the legislative departments. "The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected." Again, in the *McCray Case*, supra, answering a like contention, this court said (page 59 of 195 U.S., 24 S.Ct. 769, 778) that the argument rested upon the proposition "that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority." And it was held that if a tax be within the lawful power of the Legislature, the exertion of the power may not be restrained because of the results to arise from its exercise. \* \* \*

The statute here under review is in form plainly a taxing act, with nothing in its terms to suggest that it was intended to be anything else. It must be construed, and the intent and meaning of the Legislature ascertained, from the language of the act,

and the words used therein are to be given their ordinary meaning unless the context shows that they are differently used. *Child Labor Tax Case*, *supra*, 259 U.S. 36, 42 S.Ct. 449, 66 L.Ed. 817, 21 A.L.R. 1432. If the tax imposed had been 5 cents instead of 15 cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act. As we have already seen, it was definitely rejected in the *Veazie Bank Case*, where it was urged that the tax was "so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank"; in the *McCray Case*, where it was said that the discretion of Congress could not be controlled or limited by the courts because the latter might deem the incidence of the tax oppressive or even destructive; in the *Alaska Fish Case*, from which we have just quoted; and in the *Child Labor Tax Case*, where it was held that the intent of Congress must be derived from the language of the act, and that a prohibition instead of a tax was intended might not be inferred solely from its heavy burden.

From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment. Those decisions, as the foregoing discussion discloses, rule the present case.

Decree affirmed.

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### GREEN v. FRAZIER.

Supreme Court of the United States, 1920. 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878.

Mr. Justice DAY delivered the opinion of the Court.

This is an action by taxpayers of the state of North Dakota against Lynn J. Frazier, Governor, John N. Hagan, Commissioner of Agriculture and Labor, William Langer, Attorney General, and Obert Olson, State Treasurer, and the Industrial Commission of that state, to enjoin the enforcement of certain state legislation. The defendants Lynn J. Frazier, as Governor, William

Langer, as Attorney General, and John Hagan, as Commissioner of Agriculture and Labor, constitute the Industrial Commission, created by the Act of February 25, 1919, of the Sixteenth Legislative Assembly of the state of North Dakota (Laws 1919, c. 151).

The laws involved were attacked on various grounds, state and federal. The Supreme Court of North Dakota sustained the constitutionality of the legislation. So far as the decision rests on state grounds it is conclusive, and we need not stop to inquire concerning it. *Davis v. Hildebrant*, 241 U.S. 565, 36 S.Ct. 708, 60 L.Ed. 1172. The only ground of attack involving the validity of the legislation which requires our consideration concerns the alleged deprivation of rights secured to the plaintiffs by the Fourteenth Amendment to the federal Constitution, U.S.C.A. Const. Amend. 14. It is contended that taxation under the laws in question has the effect of depriving plaintiffs of property without due process of law.

The legislation involved consists of a series of acts passed under the authority of the state Constitution, which are: (1) An act creating an Industrial Commission of North Dakota, which is authorized to conduct and manage on behalf of that state certain utilities, industries, enterprises, and business projects, to be established by law. The act gives authority to the commission to manage, operate, control, and govern all utilities, enterprises, and business projects owned, undertaken, administered, or operated by the state of North Dakota, except those carried on in penal, charitable, or educational institutions. To that end certain powers and authority are given to the commission, among others: The right of eminent domain; to fix the buying price of things bought, and the selling price of things sold, incidental to the utilities, industries, enterprises, and business projects, and to fix rates and charges for services rendered, having in mind the accumulation of a fund with which to replace in the general funds of the state the amount received by the commission under appropriations made by the act; to procure the necessary funds for such utilities, industries, enterprises, and business projects by negotiating the bonds of the state in such amounts and in such manner as may be provided by law. \$200,000 of the funds of the state are appropriated to carry out the provisions of the act. (2) The Bank of North Dakota Act (Laws 1919, c. 147), which establishes a bank under the name of "The Bank of North Dakota," operated by the state. The Industrial Commission is placed in control of the operation and management of the bank, and is given the right of eminent domain to acquire necessary property. Public funds are to be deposited in the bank, and the

deposits are guaranteed by the state of North Dakota. Authority is given to transfer funds to other departments, institutions, utilities, industries, enterprises, or business projects, and to make loans to counties, cities, or political subdivisions of the state, or to state or national banks, on such terms as the commission may provide. Loans to individuals, associations, and private corporations are authorized, when secured by duly recorded first mortgages on lands in the state of North Dakota. An appropriation of \$100,000 is made immediately available to carry out the provisions of the act. (3) An act (Laws 1919, c. 148) providing for the issuing of bonds of the state in the sum of \$2,000,000, the proceeds of which are to constitute the capital of the Bank of North Dakota. The earnings of the bank are to be paid to the state treasurer. Tax levies are authorized sufficient to pay the interest on the bonds annually. The bonds shall mature in periods of five years, and the board of equalization is authorized to levy a tax in an amount equal to one-fifth of the amount of their principal. The state treasurer is required to establish a bank bond payment fund into which shall be paid moneys received from taxation, from appropriations and from bank earnings. \$10,000 is appropriated for the purpose of carrying the act into effect. (4) An act (Laws 1919, c. 154) providing for the issuing of bonds in the sum of not exceeding \$10,000,000, to be known as "Bonds of North Dakota, Real Estate Series." These bonds are to be issued for the purpose of raising money to procure funds for the Bank of North Dakota to replace such funds as may have been employed by it from time to time in making loans upon first mortgages upon real estate. The faith and credit of the state of North Dakota are pledged for the payment of the bonds. Moneys derived from the sale of the bonds are to be placed by the Industrial Commission in the funds of the bank, and nothing in the act is to be construed to prevent the purchase of the bonds with any funds in the Bank of North Dakota. It is further provided that the state board of equalization shall, if it appears that the funds in the hands of the state treasurer are insufficient to pay either principal or interest, accruing within a period of one year thereafter, make a necessary tax levy to meet the indicated deficiency. Provision is made for the repeated exercise of the powers granted by the act, for the purposes stated. An appropriation of \$10,000 is made for carrying into effect the provisions of this act. (5) An act (Laws 1919, c. 152) declaring the purpose of the state of North Dakota to engage in the business of manufacturing and marketing farm products, and to establish a warehouse, elevator, and flour mill system under the name of "North Dakota Mill & Elevator Association," to be operated by the state. The purpose is declared that

the state shall engage in the business of manufacturing farm products and for that purpose shall establish a system of warehouses, elevators, flour mills, factories, plants, machinery and equipment, owned, controlled, and operated by it under the name of the "North Dakota Mill & Elevator Association." The Industrial Commission is placed in control of the association, with full power, and it is authorized to acquire by purchase, lease, or right of eminent domain, all necessary property or properties, etc.; to buy, manufacture, store, mortgage, pledge, sell, and exchange all kinds of raw and manufactured farm products, and by-products, and to operate exchanges, bureaus, markets and agencies within and without the state, and in foreign countries. Provision is made for the bringing of a civil action against the state of North Dakota on account of causes of action arising out of the business. An appropriation is made out of state funds, together with the funds procured from the sale of state bonds, to be designated as the capital of the association. (6) An act (Laws 1919, c. 153) providing for the issuing of bonds of the state of North Dakota in a sum not exceeding \$5,000,000, to be known as "Bonds of North Dakota, Mill & Elevator Series," providing for a tax and making other provisions for the payment of the bonds, and appropriations for the payment of interest and principal thereof. The bonds are to be issued and sold for the purpose of carrying on the business of the Mill & Elevator Association. The faith and credit of the state of North Dakota are pledged for the payment of the bonds, both principal and interest. These bonds may be purchased with funds in the Bank of North Dakota. Taxes are provided for sufficient to pay the bonds, principal and interest, taking into account the earnings of the association. The sum of \$10,000 is appropriated from the general funds of the state to carry the provisions of the act into effect. (7) The Home Building Act (Laws 1919, c. 150) declares the purpose of the state to engage in the enterprise of providing homes for its residents and to that end to establish a business system operated by it under the name of the "Home Building Association of North Dakota," and defines its duties and the extent of its powers. The Industrial Commission is placed in control of the "Home Building Association," and is given the power of eminent domain, and the right to purchase and lease the requisite property. Provision is made for the formation of home building unions. The price of town homes is placed at \$5,000, and of farm homes at \$10,000. A bond issue of \$2,000,000, known as "Bonds of North Dakota, Home Building Series," is provided for.

There are certain principles which must be borne in mind in this connection, and which must control the decision of this court upon the federal question herein involved. This legislation

was adopted under the broad power of the state to enact laws raising by taxation such sums as are deemed necessary to promote purposes essential to the general welfare of its people. Before the adoption of the Fourteenth Amendment this power of the state was unrestrained by any federal authority. That amendment introduced a new limitation upon state power into the federal Constitution. The states were forbidden to deprive persons of life, liberty or property without due process of law. What is meant by due process of law this court has had frequent occasion to consider, and has always declined to give a precise meaning, preferring to leave its scope to judicial decisions when cases from time to time arise. *Twining v. New Jersey*, 211 U.S. 78, 100, 29 S.Ct. 14, 53 L.Ed. 97.

The due process of law clause contains no specific limitation upon the right of taxation in the states, but it has come to be settled that the authority of the states to tax does not include the right to impose taxes for merely private purposes. *Fallbrook Irrigation District v. Bradley*, 164 U.S. 155, 17 S.Ct. 56, 41 L.Ed. 369. \* \* \*

Accepting this as settled by the former adjudications of this court, the enforcement of the principle is attended with the application of certain rules equally well settled.

The taxing power of the states is primarily vested in their Legislatures, deriving their authority from the people. When a state Legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have intrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the state undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.

In the present instance under the authority of the Constitution and laws prevailing in North Dakota the people, the Legislature, and the highest court of the state have declared the purpose for which these several acts were passed to be of a public nature, and within the taxing authority of the state. With this united action of people, Legislature and court, we are not at liberty to interfere unless it is clear beyond reasonable controversy that rights secured by the federal Constitution have been violated. What is a public purpose has given rise to no little judicial consideration. Courts, as a rule, have attempted no judicial definition of a "public" as distinguished from a "private" purpose, but

have left each case to be determined by its own peculiar circumstances. \* \* \*

Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government. *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, 219 U.S. 549, 569, 31 S.Ct. 259, 55 L.Ed. 328; *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A.1915C, 1189.

With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire.

We come now to examine the grounds upon which the Supreme Court of North Dakota held this legislation not to amount to a taking of property without due process of law. The questions involved were given elaborate consideration in that court, and it held, concerning what may in general terms be denominated the "banking legislation," that it was justified for the purpose of providing banking facilities, and to enable the state to carry out the purposes of the other acts, of which the Mill & Elevator Association Act is the principal one. It justified the Mill & Elevator Association Act by the peculiar situation in the state of North Dakota, and particularly by the great agricultural industry of the state. It estimated from facts of which it was authorized to take judicial notice, that 90 per cent. of the wealth produced by the state was from agriculture, and stated that upon the prosperity and welfare of that industry other business and pursuits carried on in the state were largely dependent; that the state produced 125,000,000 bushels of wheat each year. The manner in which the present system of transporting and marketing this great crop prevents the realization of what are deemed just prices was elaborately stated. It was affirmed that the annual loss from these sources (including the loss of fertility to the soil and the failure to feed the by-products of grain to stock within the state), amounted to fifty-five millions of dollars to the wheat raisers of North Dakota. It answered the contention that the industries involved were private in their nature, by stating that all of them belonged to the state of North Dakota, and therefore the activities authorized by the legislation were to be distinguished from business of a private nature having private gain for its objective.

As to the Home Building Act, that was sustained because of the promotion of the general welfare in providing homes for the people, a large proportion of whom were tenants moving from

place to place. It was believed and affirmed by the Supreme Court of North Dakota that the opportunity to secure and maintain homes would promote the general welfare, and that the provisions of the statutes to enable this feature of the system to become effective would redound to the general benefit.

As we have said, the question for us to consider and determine is whether this system of legislation is violative of the federal Constitution because it amounts to a taking of property without due process of law. The precise question herein involved so far as we have been able to discover has never been presented to this court. The nearest approach to it is found in *Jones v. City of Portland*, 245 U.S. 217, 38 S.Ct. 112, 62 L.Ed. 252, L.R.A.1918C, 765, Ann.Cas.1918E, 660, in which we held that an act of the state of Maine (Rev.St.1903, c. 4, § 87) authorizing cities or towns to establish and maintain wood, coal and fuel yards for the purpose of selling these necessities to the inhabitants of cities and towns, did not deprive taxpayers of due process of law within the meaning of the Fourteenth Amendment. In that case we reiterated the attitude of this court towards state legislation, and repeated what had been said before, that what was or was not a public use was a question concerning which local authority, legislative and judicial, had especial means of securing information to enable them to form a judgment, and particularly that the judgment of the highest court of the state, declaring a given use to be public in its nature, would be accepted by this court unless clearly unfounded. In that case the previous decisions of this court, sustaining this proposition, were cited with approval, and a quotation was made from the opinion of the Supreme Court of Maine justifying the legislation under the conditions prevailing in that state. We think the principle of that decision is applicable here.

This is not a case of undertaking to aid private institutions by public taxation as was the fact in *Citizens' Saving & Loan Association v. Topeka*, 20 Wall. 665, 22 L.Ed. 455. In many instances states and municipalities have in late years seen fit to enter upon projects to promote the public welfare which in the past have been considered entirely within the domain of private enterprise.

Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court, if the state sees fit to enter upon such enterprises as are here involved, with the sanction of its Constitution, its Legislature and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision.

Affirmed.

## NOTE

1. The due process clause of the Fourteenth Amendment does not prohibit a state from taxing to finance the cost of a system of unemployment insurance, *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245 (1936). In the course of its opinion the Court said: "The present scheme of unemployment relief is not subject to any constitutional infirmity, as respondents argue, because it is not limited to the indigent or because it is extended to some less deserving than others, such as those discharged for misconduct. While we may assume that the state could have limited its award of unemployment benefits to the indigent and to those who had not been rightfully discharged from their employment, it was not bound to do so."

2. The use of public funds to finance the purchase of text-books for free use by persons attending non-public schools has been sustained as being for a valid public purpose because individual interests were aided only as the common interest was safeguarded, *Cochran v. State Board of Education*, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913 (1930); as was their use to provide free transportation for pupils of non-public schools, *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). It was also held in the last case that such use did not violate the due process clause of the Fourteenth Amendment by the establishment of religion; but see dissent of Mr. Justice Rutledge in this case. The dissent bore fruit in the decision of *People of State of Illinois ex rel. McCollum v. Board of Education, etc.*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. — (1948), holding the use of public school property for giving sectarian religious instruction violative of the principle of the separation of church and state in violation of the Fourteenth Amendment.

3. See B. P. McAllister, *Public Purpose in Taxation*, 18 Calif. L.Rev. 137, 281 (1930); Note, *State and Municipal Excursions Into Business Enterprises as Public Purposes Under the Taxing Power*, 41 Harv.L.Rev. 775 (1928).

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GREENOUGH v. TAX ASSESSORS OF CITY OF NEWPORT.

Supreme Court of the United States, 1947.  
331 U.S. 486, 67 S.Ct. 1400, 91 L.Ed. 1621.

Mr. Justice REED delivered the opinion of the Court.

Appellants are testamentary trustees of George H. Warren, who died a resident of New York. His will was duly probated in that state and letters testamentary issued to appellants as executors. A duly authenticated copy of said will was filed and recorded in Rhode Island and there letters testamentary were also issued. Letters of trusteeship were granted to appellants by a

surrogate's court in New York. None were needed or asked for or granted by Rhode Island. At all times pertinent to this appeal, appellants, as trustees under the will, held intangible personalty for the benefit of Constance W. Warren for her life and then to certain as yet undetermined future beneficiaries.

The evidences of the intangible property in the estate of George H. Warren and in the trust in question were at all times in New York. The life beneficiary and one of the trustees are residents of New York. The other trustee resides in Rhode Island. During the period in question, he did not, however, exercise his powers, as trustee, in Rhode Island.

A personal property tax of \$50 was assessed by the City of Newport, Rhode Island, against the resident trustee upon one-half of the value of the corpus of the trust. The applicable assessment statute for ad valorem taxes appears in the margin. At the time of this assessment, the property consisted of 500 shares of the capital stock of Standard Oil Company of New Jersey. The tax was paid by the trustees and this suit instituted, under appropriate state procedure, in the Superior Court of the County of Newport to recover the tax from the city. The Superior Court by decision denied the petition. A bill of exceptions was prosecuted by these petitioners to the Supreme Court of Rhode Island which overruled the exceptions and remitted the case to the superior court. Thereupon judgment was entered for the appellees and an appeal allowed to this Court. All questions of state procedure and of the applicability of the state statute to the resident trustee in the circumstances of this case were foreclosed for us by the rulings of the Supreme Court of Rhode Island.

The appellants' contention throughout has been that the Rhode Island statute, under which the assessment was made, if applicable to the resident trustee, was unconstitutional under the due process clause of the Fourteenth Amendment to the Constitution of the United States. Their objection in the state courts and here is that Rhode Island cannot tax the resident trustee's proportionate part of these trust intangibles merely because that trustee resides in Rhode Island. Such a tax, they urge, is unconstitutional under the due process clause because it exacts payment measured by the value of property wholly beyond the reach of Rhode Island's power and to which that state does not give protection or benefit. Appellants specifically disclaim reliance upon the argument that the Rhode Island tax exposes them to the danger of other *ad valorem* taxes in another state. The same concession was made in the Supreme Court of Rhode Island. We therefore restrict our discussion and determination to the issue presented by

appellants' insistence that Rhode Island cannot constitutionally collect this tax because the state rendered no equivalent for its exaction in protection of or benefit to the trust fund.

For the purpose of the taxation of those resident within her borders, Rhode Island has sovereign power unembarrassed by any restriction except those that emerge from the Constitution. Whether that power is exercised wisely or unwisely is the problem of each state. It may well be that sound fiscal policy would be promoted by a tax upon trust intangibles levied only by the state that is the seat of a testamentary trust. Or, it may be that the actual domicile of the trustee should be preferred for a single tax. Utilization by the states of modern reciprocal statutory tax provisions may more fairly distribute tax benefits and burdens, although the danger of competitive inducements for obtaining a settlor's favor are obvious. But our question here is whether or not a provision of the Constitution forbids this tax. Neither the expediency of the levy nor its economic effect on the economy of the taxing state is for our consideration. We are dealing with the totality of a state's authority in the exercise of its revenue raising powers.

The Fourteenth Amendment has been held to place a limit on a state's power to lay an *ad valorem* tax on its residents. Previous decisions of this Court have held that mere power over a resident does not permit a state to exact from him a property tax on his tangible property permanently located outside the jurisdiction of the taxing state. Such an exaction, the cases teach, would violate the due process clause of the Fourteenth Amendment, because no benefit or protection, adequate to support a tax exaction, is furnished by the state of residence. The domiciliary state of the owner of tangibles permanently located in another state, however, may require its resident to contribute to the government under which he lives by an income tax in which the income from the out-of-state property is an item of the taxpayer's gross income. It is immaterial, in such a case, that the property producing the income is located in another state. *People of State of New York ex rel. Cohn v. Graves*, 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed. 666, 108 A.L.R. 721. And, where the tangible property of a corporation has no taxable situs outside the domiciliary state, that state may tax the tangibles because the corporation exists under the law of its domicile. *Southern Pacific Co. v. Commonwealth of Kentucky*, 222 U.S. 63, 32 S.Ct. 13, 56 L.Ed. 96.

The precedents, holding it unconstitutional for a state to tax tangibles of a resident that are permanently beyond its boundaries, have not been applied to intangibles where the documents of owner interest are beyond the confines of the taxing jurisdic-

tion or where the choses in action are mere promises of a non-resident without documents. One reason that state taxation of a resident on his intangibles is justified is that when the taxpayer's wealth is represented by intangibles, the tax gatherer has difficulty in locating them and there is uncertainty as to which taxing district affords benefits or protection to the actual property that the intangibles represent. There may be no "papers." If the assessment is not made at the residence of the owner, intangibles may be overlooked easily by other assessors of taxes. A state is dependent upon its citizens for revenue. Wealth has long been accepted as a fair measure of a tax assessment. As a practical mode of collecting revenue, the states unrestricted by the federal Constitution have been accustomed to assess property taxes upon intangibles "wherever held or deposited," belonging to their citizens and regardless of the location of the debtor. So long as a state chooses to tax the value of intangibles as a part of a taxpayer's wealth, the location of the evidences of ownership is immaterial. If the location of the documents was controlling, their transfer to another jurisdiction would defeat the tax of the domiciliary state. As a matter of fact, there is more reason for the domiciliary state of the owner of the intangibles than for any other taxing jurisdiction to collect a property tax on the intangibles. Since the intangibles themselves have no real situs, the domicile of the owner is the nearest approximation, although other taxing jurisdictions may also have power to tax the same intangibles. Normally the intangibles are subject to the immediate control of the owner. This close relationship between the intangibles and the owner furnishes an adequate basis for the tax on the owner by the state of his residence as against any attack for violation of the Fourteenth Amendment. The state of the owner's residence supplies the owner with the benefits and protection inherent in the existence of an organized government. He may choose to expand his activities beyond its borders but the state of his residence is his base of operations. It is the place where he exercises certain privileges of citizenship and enjoys the protection of his domiciliary government. Does a similar relationship exist between a trustee and the intangibles of a trust?

The trustee of today moves freely from state to state. The settlor's residence may be one state, the seat of a trust another state and the trustee or trustees may live in still another jurisdiction or may constantly change their residence. The official life of a trustee is, of course, different from his personal. A trust, this Court has said, is "an abstraction." In federal income tax

purposes it is sometimes dealt with as though it had a separate existence. *Anderson v. Wilson*, 289 U.S. 20, 27, 53 S.Ct. 417, 420, 77 L.Ed. 1004. This is because Congress has seen fit so to deal with the trust. This entity, the trust, from another point of view consists of separate interests, the equitable interest in the *res* of the beneficiary and the legal interest of the trustee. The legal interest of the trustee in the *res* is a distinct right. It enables a settlor to protect his beneficiaries from the burdens of ownership, while the beneficiary retained the right, through equity, to compel the legal owner to act in accordance with his trust obligations. The trustee as the owner of this legal interest in the *res* may incur obligations in the administration of the trust enforceable against him, personally. Nothing else appearing, the trustee is personally liable at law for contracts for the trust. This is the rule in Rhode Island. Specific performance may be decreed against him. Of course, the trustee when acting within his powers for the trust is entitled to exoneration or reimbursement and the trust *res* may be pursued in equity by the creditor for payment.

The Supreme Court of Rhode Island considered the argument that the laws of the state afforded no benefit or protection to the resident trustee. Although nothing appeared as to any specific benefit or protection which the trustee had actually received, it concluded that the state was "ready, willing and capable" of furnishing either "if requested." A resident trustee of a foreign trust would be entitled to the same advantages from Rhode Island laws as would any natural person there resident. *Greenough v. Tax Assessors of City of Newport*, supra, 71 R.I. 488, 47 A.2d 631. There may be matters of trust administration which can be litigated only in the courts of the state that is the seat of the trust. For example, in the case of a testamentary trust, the appointment of trustees, settlement, termination and distribution under the provisions of the trust are to be carried out, normally, in the courts of decedent's domicile. See *Harrison v. Commissioner of Corporations and Taxation*, 272 Mass. 422, 427, 172 N.E. 605, 71 A.L.R. 677. But when testamentary trustees reside outside of the jurisdiction of the courts of the state of the seat of the trust, third parties dealing with the trustee on trust matters or beneficiaries may need to proceed directly against the trustee as an individual for matters arising out of his relation to the trust. Or the resident trustee may need the benefit of the Rhode Island law to enforce trust claims against a Rhode Island resident. As the trustee is a citizen of Rhode Island, the federal courts would not be open to the trustee for such causes of action where the federal jurisdiction depended upon diversity. The citizen-

ship of the trustee and not the seat of the trust or the residence of the beneficiary is the controlling factor. The trustee is suable like any other obligor. There is no provision of the federal Constitution which forbids suits in state courts against a resident trustee of a trust created under the laws of a sister state. Consequently, we must conclude that Rhode Island does offer benefit and protection through its law to the resident trustee as the owner of intangibles. And, while it may logically be urged that these benefits and protection are no more than is offered a resident owner of land or chattels, permanently out of the state, the same reasons, hereinbefore stated, 67 S.Ct. 1403, apply that permit state property taxation of a resident owner of intangibles while denying a state power to tax similarly the resident's out-of-state realty.

No precedent from this Court called to our attention indicates that the federal Constitution contains provisions that forbid taxation by a state of intangibles in the hands of a resident testamentary trustee. In *Brooke v. City of Norfolk*, 277 U.S. 27, 48 S.Ct. 422, 72 L.Ed. 767, the state property tax there invalidated, evidently as violative of the Fourteenth Amendment, was assessed to a life beneficiary, on a *res*, composed of intangibles, when both the testator and the trustee were residents of another state where the trust was administered. *Safe Deposit and Trust Company of Baltimore, Md., v. Commonwealth of Virginia*, 280 U.S. 83, 50 S.Ct. 59, 74 L.Ed. 180, 67 A.L.R. 386, held invalid a state's tax on a trust's intangibles, actually in the hands of the nonresident trustee and not subject to the control of the equitable owner, because it was an attempt to tax the trust *res*, intangibles actually in the hands of a nonresident trustee. This was said to conflict with the Fourteenth Amendment as a tax on a thing beyond the jurisdiction of the taxing state. See also *Graves v. Schmidlapp*, 315 U.S. 657, 663, 62 S.Ct. 870, 874, 86 L.Ed. 1097, 141 A.L.R. 948, where the sovereign power of taxation was held to extend to a state resident who by will disposed of intangibles held by him as trustee with power of testamentary disposition under a nonresident trust. Nothing in these cases leads to the conclusion that a state may not tax intangibles in the hands of a resident trustee of an out-of-state trust.

State courts construe their statutes according to their understanding of state policy and apply them to such situations as their interpretation of the statutory language requires. In so adjudging, they are the final judicial authority upon the meaning of their state law. It is only in circumstances where their judg-

ments collide with rights secured by the federal Constitution that we have power to protect or enforce the federal rights. In adjudging the taxability under state law of a resident trustee's ownership of intangibles, without reliance upon the residence of settlor or beneficiary or the location of the intangibles, various conclusions have been reached under state law and without regard to the Constitution of the United States. They are pertinent to our problem only as illustrations of the different viewpoints of state law.

Nor do we think it constitutionally significant that the Rhode Island trustee is not the sole trustee of the New York trust. The assessment, as the statute in question required, was only upon his proportionate interest, as a trustee, in the *res*. Whatever may have been the character of his title to the intangibles or the limitations on his sole administrative power over the trust, the resident trustee was the possessor of an interest in the intangibles, sufficient, as we have explained, to support a proportional tax for the benefit and protection afforded to that interest by Rhode Island.

Affirmed.

Mr. Justice FRANKFURTER concurred. Messrs. Justices JACKSON, MURPHY, RUTLEDGE and Chief Justice VINSON dissented.

#### NOTE

1. For state jurisdiction to tax real estate or interests therein, see *Savings & Loan Society v. Multnomah County*, 169 U.S. 421, 18 S.Ct. 392, 42 L.Ed. 803 (1897).

2. For non-domiciliary state's jurisdiction to tax tangible personalty, see *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150 (1905); *Union Tank Line Co. v. Wright*, 249 U.S. 275, 39 S.Ct. 276, 63 L.Ed. 602 (1918); *Johnson Oil Refining Co. v. Oklahoma*, 290 U.S. 158, 54 S.Ct. 142, 78 L.Ed. 238 (1933). For domiciliary state's jurisdiction to tax it, see *Southern Pac. Co. v. Kentucky*, 222 U.S. 63, 32 S.Ct. 13, 56 L.Ed. 96 (1911); *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283 (1944).

3. For other cases dealing with domiciliary state's jurisdiction to tax intangible personalty, see *Fidelity & Columbia Trust Co. v. Louisville*, 245 U.S. 54, 38 S.Ct. 40, 62 L.Ed. 145 (1917) (bank deposits); *Hawley v. Malden*, 232 U.S. 1, 34 S.Ct. 201, 58 L.Ed. 477 (1914) (corporate shares); *Anderson v. Durr*, 257 U.S. 99, 42 S.Ct. 15, 66 L.Ed. 149 (1921) (membership on an exchange); *Newark Fire Ins. Co. v. State Board of Tax Appeals*, 307 U.S. 313, 59 S.Ct.

918, 83 L.Ed. 1312 (1939) (business property assumed to have a business situs in another state). As to non-domiciliary state's jurisdiction, see *Schuylkill Trust Co. v. Pennsylvania*, 302 U.S. 506, 58 S.Ct. 295, 82 L.Ed. 392 (1938) (corporate shares); *Rogers v. Hennepin County*, 240 U.S. 184, 36 S.Ct. 265, 60 L.Ed. 594 (1916) (membership on an exchange); *First Bank Stock Corp. v. State of Minnesota*, 301 U.S. 234, 57 S.Ct. 677, 81 L.Ed. 1061 (1937) (intangibles with business situs); *Wheeling Steel Corp. v. Fox*, 298 U.S. 203, 56 S.Ct. 773, 80 L.Ed. 1143 (1936) (credits of corporation having commercial domicile within state).

4. See H. Rottschaefer, *State Jurisdiction to Impose Taxes*, 42 *Yale L.Jour.* 305 (1933); C. L. R. Lowndes, *The Passing of Situs-Jurisdiction to Tax Shares of Corporate Stock*, 45 *Harv.L.Rev.* 777 (1932); R. C. Brown, *Multiple Taxation by the States — What is Left of It?*, 48 *Harv.L.Rev.* 407 (1935); T. R. Powell, *Taxation of Things in Transit*, 7 *Va.L.Rev.* 167, 245, 429, 497 (1921); T. R. Powell, *The Business Situs of Credits*, 28 *W.Va.L.Quar.* 89 (1921); B. I. Bittker, *The Taxation of Out-of-State Tangible Property*, 56 *Yale L.Jour.* 640 (1947).

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### FARMERS' LOAN & TRUST CO. v. MINNESOTA.

Supreme Court of the United States, 1930. 280 U.S. 204, 50 S.Ct. 98,  
74 L.Ed. 371, 65 A.L.R. 1000.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Henry R. Taylor, while domiciled and residing in New York, died testate, December 4, 1925. He had long owned and kept within that state negotiable bonds and certificates of indebtedness issued by the state of Minnesota and the cities of Minneapolis and St. Paul, worth above \$300,000. Some of these were registered, others were payable to bearer. None had any connection with business carried on by or for the decedent in Minnesota. All passed under his will, which was probated in New York. There also his estate was administered and a tax exacted upon the testamentary transfer.

Minnesota assessed an inheritance tax upon the same transfer. Her Supreme Court approved this and upheld the validity of the authorizing statute. The executor—appellant—claims that, so construed and applied, that enactment conflicts with the Fourteenth Amendment, U.S.C.A.Const. Amend. 14.

When this cause first came before the Supreme Court of Minnesota, it held negotiable public obligations were something more than mere evidences of debt and, like tangibles, taxable

only at the place where found, regardless of the owner's domicile. It accordingly denied the power of that state to tax the testamentary transfer. After *Blodgett v. Silberman*, 277 U.S. 1, 48 S.Ct. 410, 72 L.Ed. 749, upon a rehearing, considering that cause along with *Blackstone v. Miller*, 188 U.S. 189, 23 S.Ct. 277, 47 L.Ed. 439, it felt obliged to treat the bonds and certificates like ordinary choses in action and to uphold the assessment.

Registration of certain of the bonds we regard as an immaterial circumstance. So did the court below. Counsel do not maintain otherwise.

Under *Blodgett v. Silberman* the obligations here involved were rightly regarded as if ordinary choses in action. The maxim *mobilia sequuntur personam* applied and gave them situs for taxation in New York—the owner's domicile. The testamentary transfer was properly taxed there. This is not controverted.

But it is said the obligations were debts of Minnesota and her corporations, subject to her control; that her laws gave them validity, protected them, and provided means for enforcing payment. Accordingly, counsel argue that they had situs for taxation purposes in that state and maintain the validity of the challenged assessment.

*Blackstone v. Miller*, *supra*, and certain approving opinions, lend support to the doctrine that ordinarily choses in action are subject to taxation both at the debtor's domicile and at the domicile of the creditor; that two states may tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the Fourteenth Amendment. The inevitable tendency of that view is to disturb good relations among the states and produce the kind of discontent expected to subside after establishment of the Union. The *Federalist*, No. VII. The practical effect of it has been bad; perhaps two-thirds of the states have endeavored to avoid the evil by resort to reciprocal exemption laws. It has been stoutly assailed on principle. Having reconsidered the supporting arguments in the light of our more recent opinions, we are compelled to declare it untenable. *Blackstone v. Miller* no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled.

Four different views concerning the situs for taxation of negotiable public obligations have been advanced. One fixes this at the domicile of the owner; another at the debtor's domicile; a third at the place where the instruments are found—physically present; and the fourth within the jurisdiction where the

owner has caused them to become integral parts of a localized business. If each state can adopt any one of these and tax accordingly, obviously, the same bonds may be declared present for taxation in two, or three, or four places at the same moment. Such a startling possibility suggests a wrong premise.

In this Court the presently approved doctrine is that no state may tax anything not within her jurisdiction without violating the Fourteenth Amendment. *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L.Ed. 179; *Union Refrig. Transit Co. v. Kentucky*, 199 U.S. 194, 26 S.Ct. 36, 39, 50 L.Ed. 150, 4 Ann.Cas. 493; *Safe Deposit & Trust Co. v. Virginia*, November 25, 1929, 280 U.S. 83, 50 S.Ct. 59, 74 L.Ed. 180. Also no state can tax the testamentary transfer of property wholly beyond her power, *Rhode Island Trust Co. v. Doughton*, 270 U.S. 69, 46 S.Ct. 256, 70 L.Ed. 475, 43 A.L.R. 1374, or impose death duties reckoned upon the value of tangibles permanently located outside her limits. *Frick v. Pennsylvania*, 268 U.S. 473, 45 S.Ct. 603, 69 L.Ed. 1058, 42 A.L.R. 316. These principles became definitely settled subsequent to *Blackstone v. Miller* and are out of harmony with the reasoning advanced to support the conclusion there announced.

At this time it cannot be assumed that tangible chattels permanently located within another state may be treated as part of the universal succession and taken into account when estimating the succession tax laid at the decedent's domicile. *Frick v. Pennsylvania* is to the contrary.

Nor is it permissible broadly to say that, notwithstanding the Fourteenth Amendment, two states have power to tax the same personalty on different and inconsistent principles or that a state always may tax according to the fiction that in successions after death *mobilia sequuntur personam* and domicile govern the whole. *Union Refrig. Transit Co. v. Kentucky*, *supra*; *Rhode Island Trust Co. v. Doughton*, *supra*; and *Safe Deposit & Trust Co. v. Virginia*, *supra*, stand in opposition.

*Southern Pacific Co. v. Kentucky*, 222 U.S. 63, 32 S.Ct. 13, 56 L.Ed. 96, indicates plainly enough that the right of one state to tax may depend somewhat upon the power of another so to do. And *Coe v. Errol*, 116 U.S. 517, 524, 6 S.Ct. 475, 477, 29 L.Ed. 715, though frequently cited to support the general affirmation that nothing in the Fourteenth Amendment prohibits double taxation, does not go so far. It affirmed the rather obvious proposition that the mere fact of taxation of tangibles by one state is not enough to exclude the right of another to tax them.

"If the owner of personal property within a state resides in another state, which taxes him for that property as part of his general estate attached to his person, this action of the latter state does not in the least affect the right of the state in which the property is situated to tax it also. \* \* \* The fact, therefore, that the owners of the logs in question were taxed for their value in Maine as a part of their general stock in trade, if such fact were proved, could have no influence in the decision of the case, and may be laid out of view."

If Maine undertook to tax logs permanently located in another state, she transcended her legitimate powers. *Union Refrig. Transit Co. v. Kentucky*, supra. Of course, such action could not affect New Hampshire's rights in respect of property localized within her limits.

While debts have no actual territorial situs, we have ruled that a state may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the state where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two states apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment. Twenty-four years ago *Union Refrig. Transit Co. v. Kentucky*, supra, declared: "In view of the enormous increase of such property [tangible personalty] since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a situs of its own for the purpose of taxation, and correlatively to exempt it at the domicile of the owner." And, certainly, existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction.

Taxation is an intensely practical matter, and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner, and we can find no sufficient

reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota.

Cleveland, Painesville & Ashtabula Railroad Co. v. Pennsylvania—"State Tax on Foreign-Held Bonds Case"—15 Wall. 300, 320, 21 L.Ed. 179, distinctly held that the state was without power to tax the owner of bonds of a domestic railroad corporation made and payable outside her limits when issued to and held by citizens and residents of another state. Through Mr. Justice Field the Court there said:

"But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors, is simply to misuse terms. All the property there can be in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations in numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement."

If the situs of the bonds for taxation had been at the debtor's domicile—Pennsylvania—the challenged effort to tax could not have interfered unduly with the debtor's contract to pay interest.

New Orleans v. Stemple, 175 U.S. 309, 20 S.Ct. 110, 44 L. Ed. 174; Bristol v. Washington County, 177 U.S. 133, 20 S.Ct. 585, 44 L.Ed. 701; Liverpool, etc., Ins. Co. v. Board of Assessors for the Parish of Orleans, 221 U.S. 346, 31 S.Ct. 550, 55 L.Ed. 762, L.R.A.1915C, 903, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner, if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile.

The bonds and certificates of the decedent had acquired permanent situs for taxation in New York; their testamentary transfer was properly taxable there, but not in Minnesota.

The judgment appealed from must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed.

[Mr. Justice STONE concurred in a separate opinion. Mr. Justice HOLMES dissented in an opinion concurred in by Mr. Justice BRANDEIS.]

#### NOTE

1. For state jurisdiction to impose inheritance tax on transfer of tangible personalty, see *Frick v. Pennsylvania*, 268 U.S. 473, 45 S.Ct. 603, 69 L.Ed. 1058 (1925); *City Bank Farmers' Trust Co. v. Schnader*, 293 U.S. 112, 55 S.Ct. 29, 79 L.Ed. 228 (1934).

2. See C. L. B. Lowndes, *Bases of Jurisdiction in State Taxation of Inheritances and Property*, 29 Mich.L.Rev. 850 (1931); H. Rottschaefer, *The Power of the States to Tax Intangibles*, 15 Minn.L. Rev. 741 (1931).

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#### CURRY v. McCANLESS

Supreme Court of the United States, 1939.  
307 U.S. 337, 59 S.Ct. 900, 83 L.Ed. 1339.

Mr. Justice STONE delivered the opinion of the Court.

The questions for decision are whether the States of Alabama and Tennessee may each constitutionally impose death taxes upon the transfer of an interest in intangibles held in trust by an Alabama trustee but passing under the will of a beneficiary decedent domiciled in Tennessee; and which of the two states may tax in the event that it is determined that only one state may constitutionally impose the tax.

Decedent, a domiciled resident of Tennessee, by trust indenture transferred certain stocks and bonds upon specified trusts to Title Guarantee Loan & Trust Company, an Alabama corporation doing business in that state. So far as now material, the indenture provided that the net income of the trust property should be paid over to decedent during her lifetime. She reserved the power to remove the trustee and substitute another, which was never done; the power to direct the sale of the trust property and the investment of the proceeds; and the power to dispose of the trust estate by her last will and testament, in which event it was to be "handled and disposed of as directed" in her will. The indenture provided further that in default of disposition by will the property was to be held in trust for the benefit

of her husband, son, and daughter. Until decedent's death the trust was administered by the trust company in Alabama and the paper evidences of the intangibles held by the trustee were at all times located in Alabama.

By her last will and testament decedent bequeathed the trust property to the trust company in trust for the benefit of her husband, son, and daughter, in different amounts and by different estates from those provided for by the trust indenture, with remainder interests over to the children of the son and the daughter respectively, and to his wife and her husband. By her will testatrix appointed a Tennessee trust company executor "as to all property which I may own in the State of Tennessee at the time of my death", and an Alabama trust company executor "as to all property which I may own in the State of Alabama and also as to all property which I may have the right to dispose of by last will and testament in said state". The will has been probated in Tennessee and in Alabama, and letters testamentary have issued to the two trust companies named as executors in the will.

The present suit was brought by the two executors in a chancery court of Tennessee against appellants, comprising the State Tax Commission of Alabama, and appellee, Commissioner of Finance and Taxation of the State of Tennessee, who are charged with the duty of collecting inheritance or succession taxes in their respective states. The bill of complaint prayed a declaratory judgment pursuant to the Tennessee Declaratory Judgments Act, Tennessee Code 1932, §§ 8835-8847, determining what portions of the estate of decedent are taxable by the State of Tennessee and what portions by the State of Alabama. Appellants and appellee appeared and by their answers and by stipulation recited in detail the facts already stated and admitted that the taxing officials of each state had imposed or asserted the right to impose an inheritance or death transfer tax on the trust property passing under decedent's will.

The chancery court of Tennessee decreed that the State of Alabama could lawfully impose the tax and that the inheritance tax law of Tennessee violated the Fourteenth Amendment in so far as it purported to impose a tax measured by the trust property disposed of by decedent's will. The Supreme Court of Tennessee reversed, and entered its decree declaring the trust property disposed of by decedent's will to be "taxable in Tennessee and not taxable in Alabama for purposes of death succession or transfer taxes." *Nashville Trust Co. v. Stokes*, Tenn., 118 S.W.2d 228. The case comes here on appeal from this decree taken by the taxing officials of Alabama under § 237(a) of the Judicial Code, 28 U.S.C. § 344(a), 28 U.S.C.A. § 344(a).

Alabama has assessed a state inheritance tax on the trust property pursuant to Article XII, c. 2, § 347.1 et seq., of its General Revenue Act. Alabama Acts 1935, p. 434 et seq. No transfer tax has been assessed upon the property by the Tennessee taxing officials, but they assert the right under the Tennessee statute to tax the transfer under decedent's will of the trust property. Sections 1259 and 1260 of the Tennessee Code of 1932 impose a tax upon the transfer at death by a resident of the state of his intangible property wherever located, including transfers under powers of appointment.

Both the court of chancery of Tennessee and the Supreme Court of Tennessee, conceiving that the Fourteenth Amendment, U.S.C.A.Const., requires the transmission at death of intangibles to be taxed at their "situs" and there only, considered that the primary question for determination was the situs or location to be attributed to the intangibles of the trust estate at the time of decedent's death. After considering all of the relevant factors, the one court concluded that the situs of the intangibles was in Alabama, the other that it was in Tennessee. Despite the impossibility in the circumstances of this case of attributing a single location to that which has no physical characteristics and which is associated in numerous intimate ways with both states, both courts have agreed that the Fourteenth Amendment compels the attribution to be made and that, once it is established by judicial pronouncement that the intangibles are in one state rather than the other, the due process clause forbids their taxation in any other.

The doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one state has received support to the limited extent that it was applied in *Farmers' Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 50 S.Ct. 98, 74 L.Ed. 371, 65 A.L.R. 1000; *Baldwin v. Missouri*, 281 U.S. 586, 50 S.Ct. 436, 74 L.Ed. 1056, 72 A.L.R. 1303; *First National Bank v. Maine*, 284 U.S. 312, 52 S.Ct. 174, 76 L.Ed. 313, 77 A.L.R. 1401. Still more recently this Court has declined to give it completely logical application. It has never been pressed to the extreme now urged upon us, and we think that neither reason nor authority requires its acceptance in the circumstances of the present case.

That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located for purposes of the jurisdiction of a court to make disposition of putative rights in them, for purposes of conflict of laws, and for purposes of taxation, is a doctrine generally accepted

both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since. Originating, it has been thought, in the tendency of the mind to identify rights with their physical subjects, see Salmond, *Jurisprudence* (2nd ed.) 398, its survival and the consequent cleavage between the rules of law applicable to tangibles and those relating to intangibles are attributable to the exclusive dominion exerted over the tangibles themselves by the government within whose territorial limits they are found. \* \* \* The power of government and its agencies to possess and to exclude others from possessing tangibles, and thus to exclude them from enjoying rights in tangibles located within its territory, affords adequate basis for an exclusive taxing jurisdiction. When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others. Other states have been said to be without jurisdiction and so without constitutional power to tax tangibles if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the property in order to compel payment of the tax. \* \* \*

Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. \* \* \* Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived. These are not in any sense fictions. They are indisputable realities.

The power to tax "is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are subjects of taxation; but those over which it does not extend, are, upon the

soundest principles, exempt from taxation." *McCulloch v. Maryland*, 4 Wheat. 316, 429, 4 L.Ed. 579. But this does not mean that the sovereign power of the state does not extend over intangibles of a domiciled resident because they have no physical location within its territory, or that its power to tax is lost because we may choose to say they are located elsewhere. A jurisdiction which does not depend on physical presence within the state is not lost by declaring that it is absent. From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile of the owner within the taxing state, or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax. \* \* \*

In cases where the owner of intangibles confines his activity to the place of his domicile it has been found convenient to substitute a rule for a reason, cf. *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313, 57 S.Ct. 466, 467, 81 L.Ed. 666, 108 A.L.R. 721; *First Bank Stock Corp. v. Minnesota*, 301 U.S. 234, 241, 57 S.Ct. 677, 680, 81 L.Ed. 1061, 113 A.L.R. 228, by saying that his intangibles are taxed at their situs and not elsewhere, or, perhaps less artificially, by invoking the maxim *mobilia sequuntur personam*, *Blodgett v. Silberman*, supra; *Baldwin v. Missouri*, supra, which means only that it is the identity or association of intangibles with the person of their owner at his domicile which gives jurisdiction to tax. But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each state concerned to tax. Whether we regard the right of a state to tax as founded on power over the object taxed, as declared by Chief Justice Marshall in *McCulloch v. Maryland*, supra, through dominion over tangibles or over persons whose relationships are the source of intangible rights; or on the benefit and protection conferred by the taxing sovereignty, or both, it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and consequently that there are many circumstances in

which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles. Shares of corporate stock may be taxed at the domicile of the shareholder and also at that of the corporation which the taxing state has created and controls; and income may be taxed both by the state where it is earned and by the state of the recipient's domicile. Protection, benefit, and power over the subject matter are not confined to either state. The taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business. \* \* \* But taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles. \* \* \*

The practical obstacles and unwarranted curtailments of state power which may be involved in attempting to prevent the taxation of diverse legal interests in intangibles in more than a single place, through first ascribing to them a fictitious situs and then invoking the prohibition of the Fourteenth Amendment against their taxation elsewhere, are exemplified by the circumstances of the present case. Here, for reasons of her own, the testatrix, although domiciled in Tennessee and enjoying the benefits of its laws, found it advantageous to create a trust of intangibles in Alabama by vesting legal title to the intangibles and limited powers of control over them in an Alabama trustee. But she also provided that by resort to her power to dispose of property by will, conferred upon her by the law of the domicile, the trust could be terminated and the property pass under the will. She thus created two sets of legal relationships resulting in distinct intangible rights, the one embodied in the legal ownership by the Alabama trustee of the intangibles, the other embodied in the equitable right of the decedent to control the action of the trustee with respect to the trust property and to compel it to pay over to her the income during her life, and in her power to dispose of the property at death.

Even if we could rightly regard these various and distinct legal interests, springing from distinct relationships, as a composite unitary interest and ascribe to it a single location in space, it is difficult to see how it could be said to be more in one state than in the other and upon what articulate principle the Fourteenth Amendment could be thought to have withdrawn from either state the taxing jurisdiction which is undoubtedly possessed before the adoption of the Amendment by conferring on one state, at the expense of the other, exclusive jurisdiction to tax. \* \* \*

If the "due process" of the Fifth Amendment, U.S.C.A.Const., does not require us to fix a single exclusive place of taxation of intangibles for the benefit of their foreign owner, who is entitled to its protection, *Burnet v. Brooks*, 288 U.S. 378, 53 S.Ct. 457, 77 L.Ed. 844, 86 A.L.R. 747; cf. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489, 51 S.Ct. 229, 231, 75 L.Ed. 473, the Fourteenth can hardly be thought to make us do so here, for the due process clause of each amendment is directed at the protection of the individual and he is entitled to its immunity as much against the state as against the national government.

If taxation is but a means of distributing the cost of government among those who are subject to its control and who enjoy the protection of its laws, see *New York ex rel. Cohn v. Graves*, supra, 300 U.S. 313, 57 S.Ct. 467, 81 L.Ed. 666, 108 A.L.R. 721; *First Bank Stock Corp. v. Minnesota*, supra, 301 U.S. 241, 57 S.Ct. 680, 81 L.Ed. 1061, 113 A.L.R. 228, legal ownership of the intangibles in Alabama by the Alabama trustee would seem to afford adequate basis for imposing on him a tax measured by their value. We can find no more ground for saying that the Fourteenth Amendment relieves it, or the property which it holds and administers in Alabama, from bearing that burden, than for saying that they are constitutionally immune from paying any other expense which normally attaches to the administration of a trust in that state. This Court has never denied the constitutional power of the trustee's domicile to subject them to property taxation. \* \* \* And since Alabama may lawfully tax the property in the trustee's hands, we perceive no ground for saying that the Fourteenth Amendment forbids the state to tax the transfer of it or an interest in it to another merely because the transfer was effected by decedent's testamentary act in another state.

No more plausible ground is assigned for depriving Tennessee of the power to tax in the circumstances of this case. The decedent's power to dispose of the intangibles was a potential source of wealth which was property in her hands from which she was under the highest obligation, in common with her fellow citizens of Tennessee, to contribute to the support of the government whose protection she enjoyed. Exercise of that power, which was in her complete and exclusive control in Tennessee, was made a taxable event by the statutes of the state. Taxation of it must be taken to be as much within the jurisdiction of the state as taxation of the transfer of a mortgage on land located in another state and there subject to taxation at its full value. \* \* \*

For purposes of taxation, a general power of appointment, of which the testatrix here was both donor and donee, has hitherto

been regarded by this Court as equivalent to ownership of the property subject to the power. *Chanler v. Kelsey*, 205 U.S. 466, 27 S.Ct. 550, 51 L.Ed. 882; *Bullen v. Wisconsin*, *supra*, 240 U.S. 630, 36 S.Ct. 474, 60 L.Ed. 830; *Chase National Bank v. United States*, 278 U.S. 327, 338, 49 S.Ct. 126, 128, 73 L.Ed. 405, 63 A.L.R. 388; see *Gray*, *Rule Against Perpetuities* (3d ed. 1916), § 524. Whether the appointee derives title from the donor, under the common law theory, or from the donee by virtue of the exercise of the power, is here immaterial. In either event the trustee's title under the will was derived from decedent, domiciled in Tennessee. Cf. *Wachovia Bank & Trust Co. v. Doughton*, 272 U.S. 567, 47 S.Ct. 202, 71 L.Ed. 413. There is no conflict here between the laws of the two states affecting the transmission of the trust property. The title of the trustee under the original Alabama trust came to an end upon the exercise of the testatrix's power of appointment; and although the trustee after her death still had title to the securities, it was in by a new title as legatee under her will, and a new beneficial interest was created, both derived through the exercise of her power of disposition. The resulting situation was no different from what it would have been if she had bequeathed the intangibles upon a new trust to a new and different trustee, either within or without the state of Alabama. So far as the power of Tennessee to tax the exercise of the power of appointment is concerned, there is no substantial difference between the present case and any other case in which at the moment of death the evidences of intangibles passing under the will of a decedent domiciled in one state are physically present in another. See *Blodgett v. Silberman*, *supra*; *Baldwin v. Missouri*, *supra*.

It has hitherto been the accepted law of this Court that the state of domicile may constitutionally tax the exercise or non-exercise at death of a general power of appointment, by one who is both donor and donee of the power, relating to securities held in trust in another state. *Bullen v. Wisconsin*, *supra*. If it be thought that it is identity of the intangibles with the person of the owner at the place of his domicile which gives power over them and hence "jurisdiction to tax", and this is the reason underlying the maxim *mobilia sequuntur personam*, it is certain here that the intangibles for some purposes are identified with the trustee, their legal owner, at the place of its domicile and that in another and different relationship and for a different purpose—the exercise of the power of disposition at death, which is the equivalent of ownership—they are identified with the place of domicile of the testatrix, Tennessee. In effecting her purposes, the

testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there. She necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both.

We can find nothing in the history of the Fourteenth Amendment and no support in reason, principle, or authority for saying that it prohibits either state, in the circumstances of this case, from laying the tax. On the contrary this Court, in sustaining the tax at the place of domicile in a case like the present, has declared that both the decedent's domicile and that of the trustee are free to tax. *Bullen v. Wisconsin*, supra, 240 U.S. 631, 36 S.Ct. 474, 60 L.Ed. 830; cf. *Keeney v. Comptroller of New York*, 222 U.S. 525, 537, 32 S.Ct. 105, 108, 56 L.Ed. 299, 38 L.R.A., N.S., 1139; *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 53 S.Ct. 244, 77 L.Ed. 463. That has remained the law of this Court until the present moment, and we see no reason for discarding it now. We find it impossible to say that taxation of intangibles can be reduced in every case to the mere mechanical operation of locating at a single place, and there taxing, every legal interest growing out of all the complex legal relationships which may be entered into between persons. This is the case because in point of actuality those interests may be too diverse in their relationships to various taxing jurisdictions to admit of unitary treatment without discarding modes of taxation long accepted and applied before the Fourteenth Amendment was adopted, and still recognized by this Court as valid. See *Paddell v. New York*, supra, 211 U.S. 448, 29 S.Ct. 139, 53 L.Ed. 275, 15 Ann.Cas. 187. The Fourteenth Amendment cannot be carried out with such mechanical nicety without infringing powers which we think have not yet been withdrawn from the states. We have recently declined to press to a logical extreme the doctrine that the Fourteenth Amendment may be invoked to compel the taxation of intangibles by only a single state by attributing to them a situs within that state. We think it cannot be pressed so far here.

If we enjoyed the freedom of the framers it is possible that we might, in the light of experience, devise a more equitable system of taxation than that which they gave us. But we are convinced that that end cannot be attained by the device of ascribing to intangibles in every case a locus for taxation in a single state despite the multiple legal interests to which they may give rise and despite the control over them or their transmission by any other state and its legitimate interest in taxing the one or the other.

While fictions are sometimes invented in order to realize the judicial conception of justice, we cannot define the constitutional guaranty in terms of a fiction so unrelated to reality without creating as many tax injustices as we would avoid and without exercising a power to remake constitutional provisions which the Constitution has not given to the courts. \* \* \*

So far as the decree of the Supreme Court of Tennessee denies the power of Alabama to tax, it is

Reversed.

Mr. Justice BUTLER dissented in an opinion concurred in by Chief Justice HUGHES and Justices ROBERTS and McREYNOLDS.

### NOTE

1. After the decision in *Farmers Loan & Trust Co. v. Minnesota*, reported at p. 676, the Supreme Court extended its principle to other intangibles in *Baldwin v. Missouri*, 281 U.S. 586, 50 S.Ct. 436, 74 L.Ed. 1056 (1930) (notes present in the non-domiciliary state); *Beidler v. South Carolina Tax Commission*, 282 U.S. 1, 51 S.Ct. 54, 75 L.Ed. 131 (1930) (credits evidenced by open book accounts of debtor in non-domiciliary states); *First Nat. Bank of Boston v. Maine*, 284 U.S. 312, 52 S.Ct. 174, 76 L.Ed. 313 (1932) (corporate shares sought to be taxed by state of corporate domicile on that basis). *Curry v. McCannless* marked a turning point. Since its decision the Court has expressly overruled *First Nat. Bank of Boston v. Maine* in *State Tax Commission of Utah v. Aldrich*, 316 U.S. 174, 62 S.Ct. 1008, 86 L.Ed. 1358 (1942); and *Wachovia Trust Co. v. Doughton*, 272 U.S. 567, 47 S.Ct. 202, 71 L.Ed. 413 (1926) (which held that state of domicile of donee of a power of appointment could not on that basis tax its exercise) in *Graves v. Schmidlapp*, 315 U.S. 657, 62 S.Ct. 870, 86 L.Ed. 1097 (1942). So far as inheritance taxation of transfer of intangibles is concerned, the Court reasserted its position that the fact that a state is that of the decedent's domicile is alone an adequate basis for the tax in *Central Hanover Bank & Trust Co. v. Kelly*, 319 U.S. 94, 63 S.Ct. 945, 87 L.Ed. 1282 (1943).

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### NEW YORK ex rel. COHN v. GRAVES.

Supreme Court of the United States, 1937. 300 U.S. 308, 57 S.Ct. 466,  
81 L.Ed. 668, 108 A.L.R. 721.

Mr. Justice STONE delivered the opinion of the Court.

This case presents the question whether a state may constitutionally tax a resident upon income received from rents of land located without the state and from interest on bonds physically without the state and secured by mortgages upon lands similarly situated.

Section 351 of article 16 of the New York Tax Law, Consol. Laws c. 60 (as added by N.Y.Laws 1919, c. 627), imposes a tax upon the "entire net income" of residents of the state. By section 359 gross income is defined as including interest and rent. The same section, as amended by N.Y.Laws 1935, c. 933, enumerates among the items of taxable income "rent (including rent derived from real property situated outside the state) \* \* \* it being intended to include all of the foregoing items, without regard to the source thereof, location of the property involved, or any other factor, except only a case where the inclusion thereof would be violative of constitutional restrictions."

Appellant, a resident of New York, brought the present certiorari proceeding in the courts of New York to review a determination of the State Tax Commission, appellees, denying her application for a refund of state income taxes assessed and paid for the years 1931 and 1932, so far as the taxes were attributable to rents received by appellant from New Jersey land, and interest paid on bonds secured by mortgaged real estate in New Jersey, where the bonds and mortgages were physically located. A ground for recovery of the tax assigned by appellant's petition was that the tax was in substance and effect a tax on real estate and tangible property located without the state, in violation of the Fourteenth Amendment of the Constitution of the United States. U.S.C.A.Const. amend. 14. Judgment for appellant (see 246 App.Div. 335, 286 N.Y.S. 485), was reversed by the New York Court of Appeals, 271 N.Y. 353, 3 N.E.2d 508. The case comes here on appeal under section 237 (a) of the Judicial Code, as amended, 28 U.S.C.A. § 344(a).

The stipulation of facts on which the case was tried in the state court does not indicate that appellant's income has been taxed by New Jersey, and it does not define the precise nature of her interest in the properties producing the income. It sets out that appellant's husband died testate, his will duly probated in New Jersey "devising and bequeathing to said taxpayer the entire net income from his estate for and during her widowhood," and that the taxed income included "rents from testator's real estate" and "interest from testator's real estate mortgages," all located in New Jersey. The terms of the will and the status of the estate during the tax years do not otherwise appear. There is nothing to show that the income-producing properties were in those years held upon an active trust, or that appellant did not receive the income as life tenant of the legal interest. See *Paletz v. Camden Safe Deposit & Trust Co.*, 109 N.J.Eq. 344, 157 A. 456; cf. *Passman v. Guarantee Trust & Safe-Deposit Co.*, 57 N.J.Eq.

273, 41 A. 953; *Westfield Trust Co. v. Beekman*, 97 N.J.Eq. 140, 128 A. 791. Any uncertainty arising from the ambiguity of the stipulation, if it has any present significance, is put at rest by the concession of appellant in brief, and in open court on the argument, that she is the owner of a life estate or interest in the properties, and that she received, as a part of her income in the tax years, the rents and interest which have been collected by the executors acting, not in their capacity as executors, but as her agents for an annual compensation.

In any case we may assume, for present purposes, that New York may not levy a property tax upon appellant's interest, whether it be legal or equitable, see *Senior v. Braden*, 295 U.S. 422, 55 S.Ct. 800, 79 L.Ed. 1520, 100 A.L.R. 794; *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83, 50 S.Ct. 59, 74 L.Ed. 180, 67 A.L.R. 386. We accordingly limit our review to the question considered and decided by the state court, whether there is anything in the Fourteenth Amendment which precludes the State of New York from taxing the income merely because it is derived from sources, which, to the extent indicated, are located outside the state.

*Income from rents.* That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. "Taxes are what we pay for civilized society," see *Compañía General de Tabacos v. Collector*, 275 U.S. 87, 100, 48 S.Ct. 100, 105, 72 L.Ed. 177. A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicil within the state. To them and to the equitable distribution of the tax burden, the economic advantage realized by the receipt of income and represented by the power to control it, bears a direct relationship. See *Lawrence v. State Tax Comm.*, 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102, 87 A.L.R. 374; *Maguire v. Trefry*, 253 U.S. 12, 14, 40 S.Ct. 417, 418, 64 L.Ed. 739; *Virginia v. Imperial Coal Sales Co.*, 293 U.S. 15, 19, 55 S.Ct. 12, 13, 79 L.Ed. 171; compare *Shaffer v. Carter*, 252 U.S. 37, 50, 40 S.Ct. 221, 224, 64 L.Ed. 445.

Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason income is not necessarily clothed with the tax immunity enjoyed by its source. A state may tax its residents upon net income from a business whose physical assets, located wholly without the state, are beyond its taxing power. *Lawrence v. State Tax Comm.*, supra; see *Shaffer v. Carter*, supra, 252 U.S. 37, at page 50, 40 S.Ct. 221, 224, 64 L.Ed. 445. It may tax net income from bonds held in trust and administered in another state, *Maguire v. Trefry*, supra, although the taxpayer's equitable interest may not be subjected to the tax, *Safe Deposit & Trust Co. v. Virginia*, supra. It may tax net income from operations in interstate commerce, although a tax on the commerce is forbidden, *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 38 S.Ct. 499, 62 L.Ed. 1135, Ann.Cas.1918E, 748; *Shaffer v. Carter*, supra. Congress may lay a tax on net income derived from the business of exporting merchandise in foreign commerce, although a tax upon articles exported is prohibited by constitutional provision (article 1, § 9, cl. 5). *Peck & Co. v. Lowe*, 247 U.S. 165, 38 S.Ct. 432, 62 L.Ed. 1049; *Barclay & Co. v. Edwards*, 267 U.S. 442, 447, 45 S.Ct. 348, 69 L.Ed. 703.

Neither analysis of the two types of taxes, nor consideration of the basis upon which the power to impose them rests, supports the contention that a tax on income is a tax on the land which produces it. The incidence of a tax on income differs from that of a tax on property. Neither tax is dependent upon the possession by the taxpayer of the subject of the other. His income may be taxed, although he owns no property, and his property may be taxed, although it produces no income. The two taxes are measured by different standards, the one by the amount of income received over a period of time, the other by the value of the property at a particular date. Income is taxed but once; the same property may be taxed recurrently. The tax on each is predicated upon different governmental benefits; the protection offered to the property in one state does not extend to the receipt and enjoyment of income from it in another.

It would be pressing the protection which the due process clause throws around the taxpayer too far to say that because a state is prohibited from taxing land which it neither protects nor controls, it is likewise prohibited from taxing the receipt and command of income from the land by its resident, who is subject to its control and enjoys the benefits of its laws. The imposition of these different taxes, by the same or different states, upon these distinct and separable taxable interests, is not subject to the objection of double taxation, which has been successfully urg-

ed in those cases where two or more states have laid the same tax upon the same property interest in intangibles or upon its transfer at death. *Safe Deposit & Trust Co. v. Virginia*, *supra*; *Farmers' Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 50 S.Ct. 98, 74 L.Ed. 371, 65 A.L.R. 1000; *Baldwin v. Missouri*, 281 U.S. 586, 50 S.Ct. 436, 74 L.Ed. 1056, 72 A.L.R. 1303; *Beidler v. South Carolina Tax Commission*, 282 U.S. 1, 51 S.Ct. 54, 75 L.Ed. 131; *First National Bank v. Maine*, 284 U.S. 312, 52 S.Ct. 174, 76 L.Ed. 313, 77 A.L.R. 1401. These considerations lead to the conclusion that income derived from real estate may be taxed to the recipient at the place of his domicil, irrespective of the location of the land, and that the state court rightly upheld the tax.

Nothing which was said or decided in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759, calls for a different conclusion. There the question for decision was whether a federal tax on income derived from rents of land is a direct tax requiring apportionment under article 1, section 2, clause 3 of the Constitution, U.S.C.A.Const. art. 1, § 2, cl. 3. In holding that the tax was "direct," the Court did not rest its decision upon the ground that the tax was a tax on the land, or that it was subject to every limitation which the Constitution imposes on property taxes. It determined only that for purposes of apportionment there were similarities in the operation of the two kinds of tax which made it appropriate to classify both as direct, and within the constitutional command. See *Pollock v. Farmers' Loan & Trust Co.*, *supra*, 157 U.S. pp. 580, 581, 15 S.Ct. 673, 39 L.Ed. 759; *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1, 16, 36 S.Ct. 236, 60 L.Ed. 493, L.R.A.1917D, 414, Ann.Cas.1917B, 713. And in *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 204, 26 S.Ct. 36, 50 L.Ed. 150, 4 Ann.Cas. 493, decided ten years after the *Pollock* Case, the present question was thought not to be foreclosed.

It is by a parity of reasoning that the immunity of income-producing instrumentalities of one government, state or national, from taxation by the other, has been extended to the income. It was thought that the tax, whether on the instrumentality or on the income produced by it, would equally burden the operations of government. See *Collector v. Day*, 11 Wall. 113, 124, 20 L.Ed. 122; *Pollock v. Farmers' Loan & Trust Co.*, *supra*, 157 U.S. 429, 583, 15 S.Ct. 673, 39 L.Ed. 759; *Gillespie v. Oklahoma*, 257 U.S. 501, 42 S.Ct. 171, 66 L.Ed. 338. But as we have seen, it does not follow that a tax on land and a tax on income derived from it are identical in their incidence or rest upon the same basis of taxing power, which are controlling factors in determining whether either tax infringes due process.

In *Senior v. Braden*, *supra*, on which appellant relies, no question of the taxation of income was involved. By concession of counsel, on which the Court rested its opinion, if the interest taxed was "land or an interest in land situate within or without the state," the tax was invalid, and the Court held that the interest represented by the certificates subjected to the tax was an equitable interest in the land. Here the subject of the tax is the receipt of income by a resident of the taxing state, and is within its taxing power, even though derived from property beyond its reach.

*Income from bonds secured by New Jersey mortgages.* What has been said of the power to tax income from land without the state is decisive of the objection to the taxation of the income from interest on bonds because they are secured by mortgages on land without the state, compare *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L.Ed. 558. Appellant also argues that the interest from the bonds is immune from taxation by New York because they have acquired a business situs in New Jersey within the doctrine of *New Orleans v. Stemple*, 175 U.S. 309, 20 S.Ct. 110, 44 L.Ed. 174; *Metropolitan Life Ins. Co. v. New Orleans*, 205 U.S. 395, 27 S.Ct. 499, 51 L.Ed. 853; *Wheeling Steel Corporation v. Fox*, 298 U.S. 193, 56 S.Ct. 773, 80 L.Ed. 1143. This contention, if pertinent to the present case, is not supported by the record. The stipulation of facts discloses only that the bonds and mortgages were located in New Jersey. See *Baldwin v. Missouri*, *supra*; *Blodgett v. Silberman*, 277 U.S. 1, 14, 15, 48 S.Ct. 410, 415, 72 L. Ed. 749. The burden rested on the taxpayer to present further facts which would establish a "business situs." *Beidler v. South Carolina Tax Commission*, 282 U.S. 1, 8, 51 S.Ct. 54, 55, 75 L.Ed. 131. \* \* \*

Affirmed.

[Mr. Justice BUTLER dissented in an opinion concurred in by Mr. Justice McREYNOLDS.]

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### HANS REES' SONS v. STATE OF NORTH CAROLINA.

Supreme Court of the United States, 1931.  
283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

The appellant, Hans Rees' Sons, Inc., a corporation organized under the laws of New York, began this action by an application to the commissioner of revenue of the state of North Carolina for the readjustment of the income tax assessed against the

appellant by that state. The assessment was for the years 1923, 1924, 1925, and 1926, in accordance with the applicable state laws, and the controversy related to the proper allocation of income to the state of North Carolina. The commissioner of revenue made his findings of fact and conclusions of law, the appellant's exceptions were overruled, and the prayer for revision of the taxes was disallowed. Appeal, waiving a jury, was taken to the superior court of Buncombe county, N. C. On the trial in that court, evidence was introduced by the appellant with respect to the course of business and the amount and sources of income for the years in question. The appellant admitted that "(a) in assessing the tax the Commissioner of Revenue followed the statutory method; \* \* \* (b) that the valuation of the real estate and tangible property of the taxpayer 'both within and without the State' is correct; (c) that the total net income used as a basis for the calculation of the tax is correct; (d) that the allocation of the net income for purposes of taxation was in full accord with the statute." The contention of the appellant was that the income tax statute as applied to the appellant, upon the facts disclosed, was arbitrary and unreasonable, and was repugnant to the commerce clause and to section 1 of the Fourteenth Amendment of the Federal Constitution. The superior court struck out the testimony offered by the appellant, as being immaterial, and held that the statute, as applied did not violate constitutional rights. The judgment dismissing the action was affirmed by the Supreme Court of the state 199 N.C. 42, 153 S.E. 850, 853. The case comes here on appeal.

As to the portions of the taxes for the years in question, which had been paid by the appellant voluntarily and as to which recovery was denied upon that ground, no question is raised here.

The Supreme Court of the state sustained the ruling of the trial court in striking out the evidence offered by the appellant, but held that, if the evidence were deemed to be competent, it would not change the result. The case may therefore be viewed as though the evidence had been received and held to have no bearing on the validity of the statute. *Fairmont Creamery Company v. Minnesota*, 274 U.S. 1, 5, 47 S.Ct. 506, 71 L.Ed. 893, 52 A.L.R. 163. The evidence was thus summarized by the state court:

"This evidence tended to show that the petitioner [the appellant here] was incorporated in the state of New York in 1901 and is engaged in the business of tanning, manufacturing, and selling belting and other heavy leathers. Many years prior to 1923 it located a manufacturing plant at Asheville, N. C., and, after this plant was in full operation, dismantled and abandoned all plants

which it had heretofore operated in different states of the Union. The business is conducted upon both wholesale and retail plans. The wholesale part of the business consists in selling certain portions of the hide to shoe manufacturers and others in carload lots. The retail part of the business consists in cutting the hide into innumerable pieces, finishing it in various ways and manners, and selling it in less than carload lots. In order to facilitate sales a warehouse is maintained in New York from which shipments are made of stock on hand to various customers. The tannery at Asheville is used as the manufacturing plant and a supply house, and, when the quantity or quality of merchandise required by a customer is not on hand in the New York warehouse, a requisition is sent to the plant at Asheville to ship to the New York warehouse or direct to the customer. The sales office is located in New York, and the salesmen report to that office. Sales are made throughout this country and in Canada and Continental Europe. Some sales are also made in North Carolina. Certain finishing work is done in New York. The evidence further tended to show that 'between forty and fifty per cent. of the output of the plant in Asheville is shipped from the Asheville tannery to New York. The other sixty per cent. is shipped direct on orders from New York. \* \* \* Shipment is made direct from Asheville to the customer.'

"The petitioner also offered evidence to the effect that the income from the business was derived from three sources, to wit: (1) buying profit; (2) manufacturing profit; (3) selling profit. It contends that buying profit resulted from unusual skill and efficiency in taking advantage of fluctuations of the hide market; that manufacturing profit was based upon the difference between the cost of tanning done by contract and the actual cost thereof when done by the petitioner at its own plant in Asheville, and that selling profit resulted from the method of cutting the leather into small parts so as to meet the needs of a given customer.

"Without burdening this opinion with detailed compilations set out in the record, the evidence offered by the petitioner tends to show that, for the years 1923, 1924, 1925, and 1926, the average income having its source in the manufacturing and tanning operations within the state of North Carolina was 17 per cent."

According to the assessments in question, as revised by the commissioner of revenue and sustained, there was allocated to the state of North Carolina, pursuant to the prescribed statutory method, for the year 1923, 83+ per cent of the appellant's income; for 1924, 85+ per cent; for 1925, 66+ per cent; and for 1926, 85+ per cent.

The applicable statutory provisions, as set forth by the state court, are as follows:

"Every corporation organized under the laws of this State shall pay annually an income tax, equivalent to four per cent. of the entire net income as herein defined, received by such corporation during the income year; and every foreign corporation doing business in this State shall pay annually an income tax equivalent to four per cent. of a proportion of its entire income to be determined according to the following rules:

"(a) In case of a company other than companies mentioned in the next succeeding section, deriving profits principally from the ownership, sale or rental of real estate or from the manufacture, purchase, sale of, trading in, or use of tangible property, such proportion of its entire net income as the fair cash value of its real estate and tangible personal property in this State on the date of the close of the fiscal year of such company in the income year is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deductions on account of encumbrances thereon.

"(b) In case of a corporation deriving profits principally from the holding or sale of intangible property, such proportion as its gross receipts in this State for the year ended on the date of the close of its fiscal year next preceding is to its gross receipts for such year within and without the State.

"(c) The words 'tangible personal property' shall be taken to mean corporeal personal property, such as machinery, tools, implements, goods, wares and merchandise and shall not be taken to mean money deposits in bank, shares of stock, bonds, notes, credits or evidence of an interest in property and evidences of debt."

Relying upon the decisions of this court with respect to statutes of a similar sort enacted by other states, the Supreme Court of the state held that the statute of North Carolina was not invalid upon its face. *Underwood Typewriter Company v. Chamberlain*, 254 U.S. 113, 120, 121, 41 S.Ct. 45, 65 L.Ed. 165; *Bass, Ratcliff & Gretton, Limited, v. State Tax Commission*, 266 U.S. 271, 280-283, 45 S.Ct. 82, 69 L.Ed. 282; *National Leather Company v. Massachusetts*, 277 U.S. 413, 423, 48 S.Ct. 534, 536, 72 L.Ed. 935. In *Underwood Typewriter Company v. Chamberlain*, *supra*, a statute of Connecticut imposed upon foreign corporations doing business partly within and partly without the state, an annual tax of 2 per cent. upon the net income earned during the preceding year on business carried on within the state, ascertained by taking such proportion of the whole net income on which the corporation was required to pay a tax to the United States as the value of its real and tangible personal property within the state bore to the value of all its real and tangible personal property.

All the manufacturing by the corporation was done in Connecticut, but the greater part of its sales were made from branch offices in other states. It was contended that the tax was an unconstitutional burden upon interstate commerce, and that it violated the Fourteenth Amendment, in that it imposed a tax on income arising from business conducted without the state. In support of the latter objection, the corporation showed that, while 47 per cent. of its real estate and tangible personal property was located in Connecticut, almost all its net profits were received in other states. This court said: "But this showing wholly fails to sustain the objection. The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other states. In this it was typical of a large part of the manufacturing business conducted in the state. The Legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the state. 'The plaintiff's argument on this branch of the case,' as stated by the Supreme Court of Errors 'carries the burden of showing that 47 per cent. of its net income is not reasonably attributable, for purposes of taxation, to the manufacture of products from the sale of which 80 per cent. of its gross earnings was derived after paying manufacturing costs.' The corporation has not even attempted to show this; and for aught that appears the percentage of net profits earned in Connecticut may have been much larger than 47 per cent. There is, consequently, nothing in this record to show that the method of apportionment adopted by the state was inherently arbitrary, or that its application to this corporation produced an unreasonable result." In this view, the validity of the Connecticut statute was sustained.

In the case of *Bass, Ratcliff & Gretton, Limited, v. State Tax Commission*, *supra*, the state of New York imposed an annual franchise tax at the rate of 3 per cent. upon the net income of the corporation. The Court, describing the statute, said that, "if the entire business of the corporation is not transacted within the State, the tax is to be based upon the portion of such ascertained net income determined by the proportion which the aggregate value of specified classes of the assets of the corporation within the State bears to the aggregate value of all such classes of assets wherever located." The corporation in that case was British, en-

gaged in brewing and selling Bass' ale. Its brewing was done, and a large part of its sales were made, in England, but it had imported a portion of its product into the United States which it sold in branch offices located in New York and Chicago. The Court regarded the question of the constitutional validity of the New York tax as controlled in its essential aspect by the decision in *Underwood Typewriter Company v. Chamberlain*, supra. And, referring to the facts of that case, the Court said: "So in the present case we are of opinion that as the Company carried on the unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions beginning with the manufacture in England and ending in sales in New York and other places—the process of manufacturing resulting in no profits until it ends in sales—the State was justified in attributing to New York a just proportion of the profits earned by the Company from such unitary business. \* \* \* Nor do we find that the method of apportioning the net income on the basis of the ratio of the segregated assets located in New York and elsewhere, was inherently arbitrary or a mere effort to reach profits earned elsewhere under the guise of legitimate taxation. \* \* \* It is not shown in the present case, any more than in the *Underwood Case*, that this application of the statutory method of apportionment has produced an unreasonable result."

In the instant case, the state court, having considered these decisions, held that the statute of North Carolina was valid upon its face, and sought to justify its view that the evidence offered by the appellant was without effect, upon the following grounds:

"The fallacy of this conclusion" (that is, the appellant's contention that the application of the statute had been shown to be unreasonable and arbitrary, and hence repugnant to the Federal Constitution) "lies in the fact that the petitioner undertakes to split into independent sources income which the record discloses was created and produced by a single business enterprise. Hides were bought for the purpose of being tanned and manufactured into leather at Asheville, N. C., and this product was to be shipped from the plant and sold and distributed from New York to the customer. The petitioner was not exclusively a hide dealer or a mere tanner or a leather salesman. It was a manufacturer and seller of leather goods, involving the purchase of raw material and the working up of that raw material into acceptable commercial forms, for the ultimate purpose of selling the finished product for a profit. Therefore, the buying, manufacturing, and selling were component parts of a single unit. The property in North Carolina is the hub from which the spokes of the entire

wheel radiate to the outer rim." And, in its final conclusion, the state court said that, if it were conceded that the evidence offered by the appellant was competent, still, as it showed that the appellant "was conducting a unitary business as contemplated and defined by the courts of final jurisdiction," it was "not permissible to lop off certain elements of the business constituting a single unit, in order to place the income beyond the taxing jurisdiction of this state."

We are unable to agree with this view. Evidence which was found to be lacking in the Underwood and Bass Cases is present here. These decisions are not authority for the conclusion that, where a corporation manufactures in one state and sells in another, the net profits of the entire transaction, as a unitary enterprise, may be attributed, regardless of evidence, to either state. In the Underwood Case, it was not decided that the entire net profits of the total business were to be allocated to Connecticut because that was the place of manufacture, or, in the Bass Case, that the entire net profits were to be allocated to New York because that was the place where sales were made. In both instances, a method of apportionment was involved which, as was said in the Underwood Case, "for all that appears in this record, reached, and was meant to reach, only the profits earned within the state." The difficulty with the evidence offered in the Underwood Case was that it failed to establish that the amount of net income with which the corporation was charged in Connecticut under the method adopted was not reasonably attributable to the processes conducted within the borders of that state; and in the Bass Case the court found a similar defect in proof with respect to the transactions in New York.

Undoubtedly the enterprise of a corporation which manufactures and sells its manufactured product is ordinarily a unitary business, and all the factors in that enterprise are essential to the realization of profits. The difficulty of making an exact apportionment is apparent, and hence, when the state has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases. But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as "component parts of a single unit" so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state. As was said in the Bass Case with regard to "the

unitary business of manufacturing and selling ale" which began with manufacturing in England and ended in sales in New York, that state "was justified in attributing to New York a just proportion of the profits earned by the Company from such unitary business." And the principle that was recognized in *National Leather Company v. Massachusetts*, *supra*, was that a tax could lawfully be imposed upon a foreign corporation with respect to "the proportionate part of its total net income which is attributable to the business carried on within the State." When, as in this case, there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a state has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction.

Nor can the evidence be put aside in the view that it merely discloses such negligible criticisms in allocation of income as are inseparable from the practical administration of a taxing system in which apportionment with mathematical exactness is impossible. The evidence in this instance, as the state court puts it, "tends to show that for the years 1923, 1924, 1925, and 1926, the average income having its source in the manufacturing and tanning operations within the State of North Carolina was seventeen per cent.," while under the assessments in question there was allocated to the state of North Carolina approximately 80 per cent. of the appellant's income.

An analysis has been submitted by the appellant for the purpose of showing that the percentage of its income attributable to North Carolina, for the years in question, did not in any event exceed 21.7 per cent. As pointed out by the state court, the appellant's evidence was to the effect that the income from its business was derived from three sources, buying profit, manufacturing profit, and selling profit. The appellant states that its sales were both wholesale and retail; that the profits from the wholesale business were in part attributable to the manufacturing in Asheville and in part to the selling in New York, but that the appellant's accountants made no attempt to separate this, and that the entire wholesale profit was credited to manufacturing and allocated to North Carolina. Similarly, it is said that no attempt was made to separate profits from manufacturing in New York from profits derived from manufacturing in Asheville, and that all manufacturing profits were allocated to North Carolina. It is insisted that, in the retail part of the business, the leather is cut into small pieces and finished in particular ways

and supplied in small lots to meet the particular needs of individual customers and that this part of the business is essential to the retail merchandising business conducted from the New York office. The so-called "buying profit" is said to result from the skill with which hides are bought, and the contention is that these buying operations were not conducted in North Carolina. If as to the last it be said that the buying of raw material for the manufacturing plant should be regarded as incident to the manufacturing business, and as reflected in the value at wholesale of the manufactured product as turned out at the factory, still it is apparent that the amount of the asserted buying profit is not enough to affect the result so far as the constitutional question is concerned.

For the present purpose, in determining the validity of the statutory method as applied to the appellant, it is not necessary to review the evidence in detail, or to determine as a matter of fact the precise part of the income which should be regarded as attributable to the business conducted in North Carolina. It is sufficient to say that, in any aspect of the evidence, and upon the assumption made by the state court with respect to the facts shown, the statutory method, as applied to the appellant's business for the years in question operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that state. In this view, the taxes as laid were beyond the state's authority. *Shaffer v. Carter*, 252 U.S. 37, 52, 53, 57, 40 S.Ct. 221, 64 L.Ed. 445.

For this reason the judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

#### NOTE

1. A non-domiciliary state may also tax a non-resident on compensation for services rendered within it, *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920); and on gains derived from the sale of property situated within it, *New York ex rel. Whitney v. Graves*, 299 U.S. 366, 57 S.Ct. 237, 81 L.Ed. 285 (1937); on dividends received from a foreign corporation doing business within it to the extent that the dividends are attributable to income earned within it, though the dividend was declared at a directors' meeting held without the state, *International Harvester Co. v. Wisconsin Dep't of Taxation*, 322 U.S. 435, 64 S.Ct. 1060, 88 L.Ed. 1373 (1944); in a prior decision the Court had sustained the same tax as one imposed on the foreign corporation itself, *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267 (1940).

2. See A. L. Harding, *State Jurisdiction to Tax Income From Foreign Land*, 25 Calif.L.Rev. 444 (1937); H. Rottschaefer, *State Jurisdiction for Income Tax Purposes*, 44 Harv.L.Rev. 1075 (1931); H. Rottschaefer, *State Jurisdiction to Tax Income*, 22 Ia.L.Rev. 292 (1937); R. Traynor, *State Taxation of Trust Income*, 22 Ia.L.Rev. 268 (1937); W. W. Watson, *Allocation of Business Income for State Income Tax Purposes*, 25 Minn.L.Rev. 851 (1941).

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### CONNECTICUT GENERAL LIFE INS. CO. v. JOHNSON.

Supreme Court of the United States, 1938.  
303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673.

Mr. Justice STONE delivered the opinion of the Court.

Appellant is a Connecticut corporation, admitted to do an insurance business in California. In addition to its business conducted within that state it has entered into contracts with other insurance corporations likewise licensed to do business in California, reinsuring them against loss on policies of life insurance effected by them in California and issued to residents there. These reinsurance contracts were entered into in Connecticut where the premiums were paid and where the losses, if any, were payable. The question for decision is whether a tax laid by California on the receipt by appellant in Connecticut of the reinsurance premiums during the years 1930 and 1931, infringes the due process clause of the Fourteenth Amendment.

In suits brought in the state court by appellant against respondent, state treasurer, to recover the taxes paid, the Supreme Court of California sustained demurrers to the complaints and gave judgments for the respondent. The cases, having been consolidated, come here on a single appeal under section 237(a) of the Judicial Code, 28 U.S.C. § 344(a), 28 U.S.C.A. § 344(a).

Section 14 of article 13 of the California Constitution, as supplemented by Act of March 5, 1921 (Stats.1921, c. 22, pp. 20, 21, Political Code, § 3664b), fixing the rate of tax, lays upon every insurance company doing business within the state an annual tax of 2.6 per cent. "upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state." The Supreme Court of California has declared that the constitutional provision imposes "a franchise tax exacted for the privilege of doing business" in the state. *Consolidated Title Securities Co. v. Hopkins*, 1 Cal.2d 414, 419, 35 P.2d 320, 323; compare *Carpenter v. People's Mutual Life Insurance Co.*, Cal.Sup., 74 P.2d 708.

Although in terms the "gross premiums received upon \* \* \* business done in this state," less the specified deductions, are made the measure of the tax, the state court in this, as in an earlier case, *Connecticut General Life Insurance Co. v. Johnson*, 3 Cal.2d 83, 43 P.2d 278 (appeal dismissed for want of a properly presented federal question, 296 U.S. 535, 56 S.Ct. 103, 80 L.Ed. 380), has held that the measure includes the premiums on appellant's reinsurance policies effected and payable in Connecticut. In this case it has declared also that the policy of the state, expressed in the constitutional provision, is "to avoid double taxation without any loss of revenue to the state." To accomplish that end the deduction of reinsurance premiums paid to companies authorized to do business within the state is allowed, it is said, on the theory that the benefit of the deduction will be passed on to the reinsurer who, being authorized to do business within the state, may be taxed on the reinsurance premiums as a means of equalizing the tax and as an offset against the benefit of the deduction which he ultimately enjoys.

No contention is made that appellant has consented to the tax imposed as a condition of the granted privilege to do business within the state. Nor could it be, for it appears that appellant had conducted its business in California under state license for many years before the taxable years in question and before the taxing act was construed by the highest court of the state, in *Connecticut General Life Insurance Co. v. Johnson*, *supra*, to apply to premiums received in Connecticut from reinsurance contracts effected there. A corporation which is allowed to come into a state and there carry on its business may claim, as an individual may claim, the protection of the Fourteenth Amendment against a subsequent application to it of state law. *Hanover Fire Insurance Co. v. Harding*, 272 U.S. 494, 47 S.Ct. 179, 71 L.Ed. 372, 49 A.L.R. 713, compare *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation*, 262 U.S. 544, 43 S.Ct. 636, 67 L.Ed. 1112.

It is said that the state could have lawfully accomplished its purpose if the statute had further stipulated that the deduction should be allowed only in those cases where the reinsurance is effected in the state or the reinsurance premiums paid there. But as the state has placed no such limitation on the allowance of deductions, the end sought can be attained only if the receipt by appellant of the reinsurance premiums paid in Connecticut upon the Connecticut policies is within the reach of California's taxing power. Appellee argues that it is, because the reinsurance transactions are so related to business carried on by appellant in California as to be a part of it and properly included in the

measure of the tax; and because, in any case, no injustice is done to appellant since the effect of the statute as construed is to redistribute the tax, which the state might have exacted from the original insurers but did not, by assessing it upon appellant to the extent to which it has received the benefit of the allowed deductions.

But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. \* \* \* It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within.

Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. *Connecticut General Life Insurance Co. v. Johnson*, supra, 3 Cal.2d 83, 87, 43 P.2d 278; compare *Morris & Co. v. Skandinavia Insurance Co.*, 279 U.S. 405, 408, 49 S.Ct. 360, 361, 73 L.Ed. 762. Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance, or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection.

The grant by the state of the privilege of doing business there and its consequent authority to tax the privilege do not withdraw from the protection of the due process clause the privilege,

which California does not grant, of doing business elsewhere. *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355; *International Paper Co. v. Massachusetts*, 246 U.S. 135, 38 S.Ct. 292, 62 L.Ed. 624, Ann.Cas.1918C, 617; *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U.S. 385, 398, 23 S.Ct. 463, 47 L.Ed. 513. Even though a tax on the privilege of doing business within the state in insuring residents and risks within it may be measured by the premiums collected, including those mailed to the home office without the state, *Equitable Life Assurance Society v. Pennsylvania*, 238 U.S. 143, 35 S.Ct. 829, 59 L.Ed. 1239, and though the writing of policies without the state insuring residents and risks within it is taxable because within the granted privilege, *Compañía General de Tabacos v. Collector*, supra, 275 U.S. 87, 98, 48 S.Ct. 100, 104, 72 L.Ed. 177, there is no basis for saying that reinsurance which does not run to the original insured, and which from its inception to its termination involves no action taken within California, even the settlement and adjustment of claims, is embraced in any privilege granted by that state. \* \* \* All that appellant did in effecting the reinsurance was done without the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state.

Reversed.

Mr. Justice BLACK dissented.

#### NOTE

1. A state has no jurisdiction to impose a gross premium tax on a foreign insurance company after it has ceased to do business within it by taxing premiums thereafter paid directly to the company's office outside the state under policies written within it while the company was doing business therein, *Provident Sav. Life Assur. Society v. Kentucky*, 239 U.S. 103, 36 S.Ct. 34, 60 L.Ed. 167 (1915). Compare *Continental Assur. Co. v. Tennessee*, 311 U.S. 5, 61 S.Ct. 1, 85 L.Ed. 5 (1940), involving a tax imposed for the years when the company was engaged in business within the taxing state but measured by premiums paid after it had withdrawn from that state.

2. Other cases discussing the extent to which the jurisdictional limits on a state's power to impose franchise taxes on foreign corporations for transacting a local business therein limiting its selection of the measure of such tax are *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355 (1910); *Cudahy Packing Co. v. Hinkle*, 278 U.S. 460, 49 S.Ct. 204, 73 L.Ed. 454 (1929); *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, 60 S.Ct. 273, 84 L.Ed. 304 (1939).

## GREAT ATLANTIC &amp; PACIFIC TEA CO. v. GROSJEAN.

Supreme Court of the United States, 1937. 301 U.S. 412, 57 S.Ct. 772,  
81 L.Ed. 1193, 112 A.L.R. 293.

Mr. Justice ROBERTS delivered the opinion of the Court.

This cause presents the questions whether the method prescribed by a chain store tax act for ascertaining the rate of taxation offends the Fourteenth Amendment and the commerce clause (article 1, § 8, cl. 3) of the Federal Constitution, U.S.C.A. Const. Amend. 14 and art. 1, § 8, cl. 3.

In 1932 the legislature of Louisiana adopted an act levying an occupation or license tax upon chain stores, under which the exaction was fifteen dollars upon each of two or more stores, not in excess of five; upon each store in excess of five, but not exceeding ten, \$25; and the amount increased in brackets for additional stores, the last bracket embracing stores in excess of fifty upon each of which the tax was \$200.

By Act No. 51 of 1934 the earlier law was amended to lay the tax on "persons, firms, partnerships, corporations or associations of persons engaged in the business of operating two or more stores or mercantile establishments, one or more of which is located in this State, \* \* \* under the same general management, supervision, ownership or control." Section 1. Section 3 provides that the tax "shall be based on the number of stores or mercantile establishments included under the same general management, supervision, ownership or control, whether operated in this State or not, and shall be fixed and graded as follows, to-wit: (1) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of not more than ten stores, the annual license shall be Ten (\$10.00) Dollars for each such store operated in this State." There are fifteen additional paragraphs progressively increasing the rate per store in Louisiana of larger chains, the last fixing the rate for a store belonging to a chain of more than five hundred at \$550.

The Great Atlantic & Pacific Tea Company, an Arizona corporation, owning, operating or controlling 15,082 stores in the United States, Canada, and elsewhere, 106 of which are in Louisiana, filed its bill in the District Court to restrain the appellees, state officers, from enforcing the statute. Other corporations operating chains, some units of which are located in Louisiana, intervened as plaintiffs. A temporary restraining order issued,

the appellees answered the bill, and the case was heard upon pleadings and proofs by a specially constituted court of three judges, which upheld the statute and dismissed the bill.

The constitutional infirmity of the act is said to consist in arbitrary discrimination in favor of local as against national chains, in the attempt to tax property and activities which are beyond the state's jurisdiction, and in burdening interstate commerce. We hold the legislation impregnable to attack on these grounds.

First. The exaction is an occupation or license tax. The subject is the conduct of a business within Louisiana. Without contravening the equal protection clause of the Fourteenth Amendment a state may separately classify for taxation the conduct of a chain store, and may increase the rate in proportion to the increase in the number of stores within the state, since the opportunities and powers of a chain store operator become greater with the growth of the number of units maintained. The appellants assert that in adjusting the rate for a chain store in Louisiana the legislature may not take into account the size of the chain to which the store belongs, by counting the total number of its units wherever located. So to do, it is claimed, is arbitrarily to discriminate against sectional or national chains in favor of intrastate chains.

The District Court found that the testimony offered by the State was similar to that in *State Board of Tax Commissioners v. Jackson*, *supra*; established the difference in type of operation between the operator of one store and the operator of many, and the variance in advantage and mode of operation with the number of units in the chain. In addition, the court found that all the stores of a retail chain contribute to the central purchasing power of the chain irrespective of state lines and location of stores, and increase the per unit multiple advantage enjoyed by the operator of the system; that the greater the number of units the greater the purchasing power of the chain, the greater the rebates and allowances, the greater the advantages in advertising, the greater the capital employed, the greater the social and economic consequences, and the lower the cost of distribution and overhead. "In fine, the record in this case shows the contribution to the advantages made by each unit in the chain, and the per unit advantage made possible by the whole system, and in that respect only does it differ materially from the proof which was before the court in the *Jackson Case*." These findings are assigned as error, but they have substantial support in the record and we therefore accept them.

If the competitive advantages of a chain increase with the number of its component links, it is hard to see how these advantages cease at the state boundary. Under the findings a store belonging to a chain of one hundred, all located in Louisiana, has not the same competitive advantages as one of one hundred Louisiana stores belonging to a national chain of one thousand. The appellants lean heavily on the findings of the court respecting the relative business in New Orleans of the Great Atlantic & Pacific Company and the H. G. Hill Stores, Inc., a Louisiana corporation. The court found that the operations of the two are generally of the same character; the former conducts one hundred and six stores in the state, sixty-two of which are in the city of New Orleans; the latter ninety-two in the state, of which eighty-seven are in the city. Each concern conducts grocery and meat stores with substantially the same line of merchandise and their sales methods are practically the same. The gross volume of sales of Hill in New Orleans is much greater; it has more stores, and does more business per store in that city than the Atlantic & Pacific. The court further found, however, that the total purchasing power of the Atlantic & Pacific is much greater than that of Hill; that Atlantic & Pacific has field offices located at primary markets, which are in charge of specialists and supervised by central purchasing offices in New York, and maintains divisional warehouses throughout the country, whereas the operations of Hill are confined to Louisiana, and chiefly to New Orleans. Under the statute Hill is taxable at the rate of \$30 per store as against \$550 assessable against Atlantic & Pacific. These facts are said to demonstrate that the act denies the appellant and other intervenors the equal protection of the laws by arbitrarily discriminating against national in favor of local chains. But the contention is answered not only by the specific finding respecting the difference between the two companies' methods but by the general finding that addition of units to a chain increases the competitive advantage of each store in the chain.

The court's findings are supported by evidence bearing upon a variety of advantages enjoyed by large chains which are unavailable to smaller chains. One striking illustration is furnished by the uncontradicted proof that the Atlantic & Pacific Company received, in the year 1934, from its vendors, secret rebates, allowances, and brokerage fees amounting to \$8,105,000 which were demanded by the company as a condition of purchasing from the vendors in question. The leverage which accomplished this was the enormous purchasing power of the company. The amount thus obtained equals \$530 for each of the Atlantic &

Pacific Company's stores or nearly the amount of the tax exacted by the statute. The appellants insist that these facts are not significant because there is testimony that, in the drug trade, quantity discounts usually do not increase after a certain volume of purchases is reached, but the testimony does not specify the point where quantity discounts cease to grow. The record discloses what would be plain enough without evidence, that generally volume of purchasing power spells lower prices, special terms, and other advantages. It is unnecessary to discuss the evidence supporting the findings with respect to other facilities enjoyed only, or in increased measure, by the larger chains.

The appellants urge that the act arbitrarily discriminates in favor of local chains because it is inconceivable that a chain operating wholly within the state would have five hundred stores, not to mention upwards of fifteen thousand, the number maintained by the Atlantic & Pacific. The argument is inconsistent with the finding that additional units, wherever situate, increase the advantages and economic effects of the chain as a whole and of each unit; and ignores the possibility that a chain-store company of national scope might well be incorporated in Louisiana, whose stores in that state would be rated for taxation according to its total stores within and without the state.

Other instances of the working of the act are cited to show that it arbitrarily discriminates against national chains and in favor of local ones solely because they are such. Thus, it is said, if a national chain owning 501 stores in other states, establishes a single store in a Louisiana city where there is a local chain of two or three like establishments, the national concern must pay a license of \$550 for its one store while the stores of the local chain are taxed but \$10 each. The appellees retort that since the earlier law imposed a tax of \$15 on each store in the local chain and none upon the one Louisiana store of the national chain it was more vulnerable to the charge of arbitrariness than the act under review. Whatever the pertinence of the reply, the facts found respecting the advantages of a larger chain as compared with a smaller justify as not unreasonable or arbitrary the imposition of a higher license tax on the units of the former which are maintained within the state. Even one unit of such a national chain located in Louisiana enjoys competitive advantages over the stores of the local proprietor consequent upon its relation to the far-flung activities and facilities of the chain.

The act under review is to be distinguished from the Florida statute considered in *Liggett Co. v. Lee*, *supra*, which increased

the tax if the chain happened to have stores in two counties of the state rather than in one. The increase of rate was held arbitrary because it was unrelated to the size or character of the chain and was conditioned solely upon the location of one or more of its units. The Louisiana act adopts no such basis of classification. A small chain of three stores, one of which is in Louisiana and two in Mississippi, will pay exactly the same tax as a similar organization having the same number of stores all in Louisiana. A concern having ninety-two stores scattered over ten states, seven of which are in Louisiana, will pay exactly the same tax per Louisiana store as the H. G. Hill Stores, Inc., all of whose ninety-two stores are in Louisiana. Thus it appears that the classification is not based upon the location of the stores within or without the state but upon the type of business conducted, the scale of that business, its accompanying competitive advantages and economic results.

Finally, since the court below found that the sales and earnings of the individual stores of a chain differ in various portions of the country and those of the Louisiana stores have been below the average for all stores of many of the appellants, the claim is that the statute, by taking into account all units indiscriminately in fixing the rate arbitrarily disregards the value of the local privilege for which the license fee is charged. We cannot say that classification of chains according to the number of units must be condemned because another method more nicely adjusted to represent the differences in earning power of the individual stores might have been chosen, for the legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships. It is enough that the classification has reasonable relation to the differences in the practices of small and large chains. The statute bears equally upon all who fall into the same class, and this satisfies the guaranty of equal protection. \* \* \*

The judgment of the District Court is affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice STONE took no part in the consideration or decision of this case.

[Mr. Justice SUTHERLAND, dissented in an opinion concurred in by Mr. Justice McREYNOLDS and Mr. Justice BUTLER.]

#### NOTE

1. On the general problem of the limitations on a state's power to establish classifications in exercising its taxing power, see J. B. Sholley, *Equal Protection in Tax Legislation*, 24 Va.L.Rev. 229, 388 (1938); J. B. Sholley, *Corporate Taxpayers and the Equal Protection Clause*, 31 Ill.L.Rev. 463, 567 (1937).

## SIOUX CITY BRIDGE CO. v. DAKOTA COUNTY, NEB.

Supreme Court of the United States, 1922. 260 U.S. 441, 43 S.Ct. 190,  
67 L.Ed. 340, 28 A.L.R. 979.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This case is here by writ of certiorari to the Supreme Court of Nebraska. The question is whether the taxing authorities of the state of Nebraska and of Dakota county in assessing taxes against the petitioner, the Sioux City Bridge Company, upon that part of its bridge across the Missouri river at South Sioux City, which is in the jurisdiction of Nebraska, deprived the Bridge Company of due process of law and denied it the equal protection of the laws in violation of the Fourteenth Amendment, U.S.C.A.Const. Amend. 14.

For a number of years before 1918, the Bridge Company had returned the Nebraska part of the bridge for taxation at \$600,000. In that year the assessor of Dakota county sent the blank return to the Bridge Company as usual, but the Bridge Company sent back the proposed return, refusing to sign, and insisting that the valuation was too high. The assessor then returned the bridge at \$600,000 as formerly. The Bridge Company appealed to the board of equalization of the county. Only the counsel for the Bridge Company and for the city of South Sioux City appeared. No witnesses were called and no evidence produced, but the board of equalization, on the appeal of the Bridge Company for reduction, raised the assessment above that of the assessor \$100,000. From this ruling an appeal was taken to the district court of Dakota county for relief against the action of the board of equalization on the ground that the valuation was excessive, was without evidence and arbitrary, that it violated the Constitution of the state requiring a uniformity of taxing burdens, and that it deprived the Bridge Company of due process and equal protection of the law as forbidden by the Fourteenth Amendment.

Seventy-four per cent. of the total value of the bridge is in Dakota county, Neb., and 26 per cent. is in Iowa. The original cost of the bridge was \$941,000, but some wooden trestles in the original construction were taken out and steel substituted and this increased the original cost to \$1,022,000. The bridge was built in 1888. Since 1907 it has been under lease to two railroads and jointly they maintain the bridge, pay the taxes and 8 per cent. on the original cost of \$945,800. The leases are short-time leases because the bridge, while in good repair,

is too light for modern traffic and can only be used under burdensome and expensive restrictions. One of the railroad companies has made soundings for a new bridge. The engineers report the existing bridge to be totally out of date and estimate a depreciation in its value on this account of \$300,000 from its original cost. The same witnesses testified that to build the bridge just as it was would cost at present prices from \$1,300,000 to \$1,500,000, but that it would be most foolish to build a bridge of that old type now.

A tax commissioner of one of the lessee railroads, with long experience in taxation and valuation, testified that from an examination of the sales of real estate as shown by deeds of record in Nebraska and in Dakota county and the tax list, the acre property in Dakota county was assessed at 55.70 per cent. of its value; that improvements in city property were assessed at 49.29 per cent. of their selling value, and had been so assessed for seven years. The county assessor thought such sales were not best evidence of true value in money, and denied that there was any attempt to value at less than such value.

The district court held the reasonable value of the bridge in Nebraska to be more than \$700,000, as assessed, and dismissed the appeal. It made no finding upon the issue as to whether there was an under valuation of other real estate and improvements in Dakota county or the state and did not refer to it.

The Bridge Company carried the case on appeal to the Supreme Court. That court found from the evidence that \$700,000 as the true value was not so manifestly wrong that it was justified in disturbing the assessment. Taking up the objection that the real property and improvements were undervalued in Dakota county, the court said:

"It is finally urged that this court should reduce the true value of the bridge as found by the court to 55 per cent. of such value, for the reason that other property in the district is assessed at 55 per cent. of its true value, and that it would be manifestly unjust to appellant to assess its property at its true value while other property in the district is assessed at 55 per cent. of its value.

"While undoubtedly the law contemplates that there should be equality in taxation, we are of the view that the plan of equalization proposed by appellant is not the proper remedy. The rule is now settled by a recent decision of this court that when property is assessed at its true value, and other property in the district is assessed below its true value, the proper remedy is to have the property assessed below its true value raised,

rather than to have property assessed at its true value reduced. *Lincoln Telephone & Telegraph Company v. Johnson County*, 102 Neb. 254, 166 N.W. 627. In the argument of appellant the soundness of this ruling is assailed, and authorities in other jurisdictions are cited which seem at variance with our holding. We are not willing, however, to recede from the rule of that case."

Section 1, article 9, of the Constitution of Nebraska, contains the following:

"The Legislature shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the Legislature shall direct. \* \* \*"

Section 6300 of the Revised Statutes of Nebraska provides:

"All property in this state not expressly exempt therefrom shall be subject to taxation, and shall be valued at its actual value which shall be entered opposite each item and shall be assessed at 20 per cent. of such actual value. Such assessed value shall be entered in separate column opposite each item and shall be taken and considered as the taxable value of such property, and the value at which it shall be listed and upon which the levy shall be made. Actual value as used in this chapter shall mean its value in the market in the ordinary course of trade."

In the case of *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 352, 353, 38 S.Ct. 495, 62 L.Ed. 1154, this court said:

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. *Raymond v. Chicago Union Traction Company*, 207 U.S. 20, 35, 37, 28 S.Ct. 7, 52 L.Ed. 78, 12 Ann.Cas. 757."

Analogous cases are *Greene v. Louisville & Interurban R. Co.*, 244 U.S. 499, 516, 517, 518, 37 S.Ct. 673, 61 L.Ed. 1280; *Cummins v. National Bank*, 101 U.S. 153, 160, 25 L.Ed. 903; *Taylor v. Louisville & N. R. Co.*, 88 F. 350, 364, 365, 372, 374, 31 C.C.A. 537; *Louisville & N. Ry. Co. v. Bosworth*, D.C., 209 F. 380, 452; *Washington Water Power Co. v. Kootenai County*, C.C.A., 270 F. 369, 374.

The charge made by the Bridge Company in this case was that the state, through its duly constituted agents, to wit, the county assessor and the county board of equalization, improperly executed the Constitution and taxing laws of the state and intentionally and arbitrarily assessed the Bridge Company's property at 100 per cent. of its true value and all the other real estate and its improvements in the county at 55 per cent.

The Supreme Court does not make it clear whether it thinks the discrimination charged was proved or not, but assuming the discrimination, it holds that the Bridge Company has no remedy except "to have the property assessed below its true value raised rather than to have property assessed at its true value reduced." The dilemma presented by a case where one or a few of a class of taxpayers are assessed at 100 per cent. of the value of their property in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage in violation of the law, has been often dealt with by courts and there has been a conflict of view as to what should be done. There is no doubt, however, of the view taken of such cases by the federal courts in the enforcement of the uniformity clauses of state statutes and constitutions and of the equal protection clause of the Fourteenth Amendment. The exact question was considered at length by the Circuit Court of Appeals of the Sixth Circuit in the case of *Taylor v. Louisville & N. R. Co.*, 88 F. 350, 364, 365, 31 C.C. A. 537, and the language of that court was approved and incorporated in the decision of this court in *Greene v. Louisville & Interurban R. Co.*, 244 U.S. 499, 516, 517, 518, 37 S.Ct. 673, 61 L.Ed. 1280. The conclusion in these and other federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of underassessed property in the taxing district. This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect the decision of the Nebraska Supreme Court in this case upholds the violation of the Fourteenth Amendment to the injury of the Bridge Company. We must, therefore, reverse its judgment.

But we construe the action of the court not to be equivalent to a finding that such intentional discrimination existed between the valuation of the Bridge Company's property and that of all other real property and improvements in the county, but rather a ruling that even if it did exist, the Bridge Company must continue to pay taxes on a full 100 per cent. valuation of its property. It was on the same principle, doubtless, that the district court ignored the issue of discrimination altogether. It is therefore just that upon reversal we should remand the case for a further hearing upon the issue of discrimination, inviting attention to the well-established rule in the decisions of this court, cited above, that mere errors of judgment do not support a claim of discrimination, but that there must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 353, 38 S.Ct. 495, 62 L.Ed. 1154.

The judgment of the Supreme Court of Nebraska is reversed, and is remanded for further proceedings not inconsistent with this opinion.

#### NOTE

1. See also *Cumberland Coal Co. v. Board of Revision of Tax Assessments of Greene County*, 284 U.S. 23, 52 S.Ct. 48, 76 L.Ed. 146 (1931). As to when property belongs to the same class, see *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 54 S.Ct. 830, 78 L.Ed. 1411 (1934); *Charleston Fed. Sav. & Loan Ass'n v. Anderson*, 324 U.S. 182, 65 S.Ct. 624, 89 L.Ed. 857 (1945).

2. The due process clause of the Fourteenth Amendment prohibits a state from giving arbitrary retroactivity to its tax laws. See *Coolidge v. Long*, 282 U.S. 582, 51 S.Ct. 306, 75 L.Ed. 562 (1931); *Binney v. Long*, 299 U.S. 280, 57 S.Ct. 206, 81 L.Ed. 239 (1936); *Welch v. Henry*, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938).

## CHAPTER 18

### THE POWER OF EMINENT DOMAIN

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#### LONG ISLAND WATER-SUPPLY CO. v. BROOKLYN.

Supreme Court of United States, 1897. 166 U.S. 685, 17 S.Ct. 718, 41 L.Ed. 1165.

[Error to Supreme Court of New York. The Long Island Water Supply Company resisted the taking of its property, franchises, and contracts by eminent domain by the city of Brooklyn, for the reasons stated in the opinion below. The Court of Appeals upheld the judgment of the lower courts in favor of the condemnation, and the state Supreme Court entered final judgment against the company, from which this writ of error was taken.]

Mr. Justice BREWER. \* \* \* The contention of plaintiff in error is that the proceedings had under the statute which resulted in the judgment of condemnation violate section 10, art. 1, of the Constitution of the United States, U.S.C.A.Const. art. 1, § 10, which forbids any state to pass a law impairing the obligation of contracts, and were not "due process of law," as required by the fourteenth amendment, U.S.C.A.Const. amend. 14.

With reference to the first part of this contention, it is said that in 1881 the town of New Lots made a contract with the water-supply company by which for each and every year during the term of 25 years it covenanted to pay to the company so much per hydrant for hydrants furnished and supplied by it; that the act of annexation continued the burden of this obligation upon the territory within the limits of the town, although thereafter the town, as a separate municipality, ceased to exist, and the territory became simply a ward of the city of Brooklyn; that the condemnation proceedings destroyed this contract, and released the territory from any obligation to pay the stipulated hydrant rental; that a state or municipality cannot do indirectly what it cannot do directly; that, as the municipality could not, by any direct act, release itself from any of the obligations of its contract, it could not accomplish the same result by proceedings in condemnation.

We cannot yield our assent to this contention. All private property is held subject to the demands of a public use. The constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation. That the supply of water to a city is a public purpose cannot be doubted, and hence the condemnation of a water-supply system must be recognized as within the unquestioned limits of the power of eminent domain. It matters not to whom the water-supply system belongs, individual or corporation, or what franchises are connected with it; all may be taken for public uses upon payment of just compensation. It is not disputed by counsel that, were there no contract between the company and the town, the water-works might be taken by condemnation. And so the contention is, practically, that the existence of the contract withdraws the property, during the life of the contract, from the scope of the power of eminent domain, because taking the tangible property will prevent the company from supplying water, and therefore operate to relieve the town from the payment of hydrant rentals. In other words, the prohibition against a law impairing the obligation of contracts stays the power of eminent domain in respect to property which otherwise could be taken by it.

Such a decision would be far-reaching in its effects. There is probably no water company in the land which has not some subsisting contract with a municipality which it supplies, and within which its works are located; and a ruling that all those properties are beyond the reach of the power of eminent domain during the existence of those contracts is one which, to say the least, would require careful consideration before receiving judicial sanction. The fact that this particular contract is for the payment of money for hydrant rental is not vital. Every contract is equally within the protecting reach of the prohibitory clause of the Constitution. The charter of a corporation is a contract, and its obligations cannot be impaired. So it would seem to follow, if plaintiff in error's contention is sound, that the franchises of a corporation could not be taken by condemnation, because thereby the contract created by the charter is impaired. The privileges granted to the corporation are taken away, and the obligation of the corporation to perform is also destroyed. \* \* \*

The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public uses.

\* \* \* The case of *West River Bridge Co. v. Dix*, 6 How. 507,

12 L.Ed. 535, is in point. \* \* \* [This involved the condemnation of a toll bridge with an exclusive franchise and its conversion into a free bridge by the state of Vermont. The bridge company took a writ of error to the federal Supreme Court, alleging the obligation of its franchise contract was impaired.] This contention was overruled, and in the course of the opinion it was observed:

"No state, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the 'eminent domain of the state,' is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise. \* \* \*

Now, it is undeniable that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the state, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfill it. But into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise, not out of the literal terms of the contract itself. They are superinduced by the pre-existing and higher authority of the laws of nature, or nations, or of the community to which the parties belong. They are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfillment of an essential and inseparable condition. \* \* \* A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may

be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons, in the use or enjoyment of their private property, to control, and actually to prohibit, the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more. It is incorporeal property, and is so defined by Justice Blackstone, when treating, in his second volume (chapter 3, p. 20), of the Rights of Things."

See, also, *Richmond, F. & P. R. Co. v. Louisa R. Co.*, 13 How. 71, 83, 14 L.Ed. 55; *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray, Mass., 1, 35, 36. \* \* \*

Judgment affirmed.

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#### NOTE

1. Though the Constitution of the United States does not explicitly confer the power of eminent domain upon the United States, it has it as one of its implied powers, *Kohl v. United States*, 91 U.S. 367, 23 L.Ed. 449 (1875).

2. In *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186 (1923), the Supreme Court stated that "We necessarily accept, as a matter of state law, the holding of the District Court of Appeal that the proviso to Section 1241 of the Code made the resolutions of the Board of Supervisors conclusive evidence as to the necessity of taking these particular highways and the other matters therein specified. \* \* \* And so construed this statute is not in conflict with the Fourteenth Amendment, either because it fails to provide for a hearing by the landowners before such resolution, or otherwise. The necessity for appropriating private property for public use is not a judicial question. This power resides in the Legislature, and may be exercised by the Legislature or delegated by it to public officers."

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#### PEOPLE OF PUERTO RICO v. EASTERN SUGAR ASSOCIATES.

Circuit Court of Appeals of the United States, First Circuit, 1946.  
156 F.2d 316.

WOODBURY, Circuit Judge. This appeal is from an order of the District Court of the United States for Puerto Rico dismissing a petition to condemn approximately 3,100 acres of land situ-

ated on the Island of Vieques owned by the appellee, Eastern Sugar Associates, subject to a mortgage held by the appellee, National City Bank of New York, on the ground that the petition fails "to state a public use or purpose for which private property may be acquired by eminent domain."

By Act No. 26 approved April 12, 1941, (Laws of Puerto Rico 1941, p. 388 et seq.) called the "Land Law of Puerto Rico," the insular Legislature launched a far-reaching program of agrarian reform. This law is long and rather complicated. At the moment it will suffice to say that after a lengthy "Statement of Motives" the Act creates a board in the "nature of a governmental agency or instrumentality of The People of Puerto Rico" in the Department of Agriculture and Commerce, to be called the "Land Authority of Puerto Rico", "for the purpose of carrying out the agricultural policy of The People of Puerto Rico as determined by this Act, and to take the necessary action to put an end to the existing corporative latifundia in this Island, block its reappearance in the future, insure to individuals the conservation of their land, assist in the creation of new landowners, facilitate the utilization of land for the best public benefit under efficient and economic production plans; provide the means for the agregados and slum dwellers to acquire parcels of land on which to build their homes, and to take all action leading to the most scientific, economic and efficient enjoyment of land by the people of Puerto Rico." Then the Act goes on to make detailed provisions with respect to the organization, powers, and duties of the Land Authority, and to authorize it both to expropriate lands held in violation of the so called 500 acre provision of the Organic Act (39 Stat. 964, 48 U.S.C.A. § 752) and also to request the Insular Government to acquire on its behalf by eminent domain "title to any real property or estate thereon (sic) which might be necessary or advisable for the purposes of the Authority." The act fully establishes the procedure to be followed in condemnation proceedings and provides, apparently adequately, for payment of "just compensation" for property so taken.

As this Land Law stood, after amendment, at the time the present condemnation proceedings were instituted, the Land Authority was authorized to dispose of lands which it acquired for three purposes; (1) in small parcels to individual agregados for the erection of their dwellings, (2) in somewhat larger parcels to individual farmers for subsistence farms, and (3) in large parcels by lease to expert farmers, agronomists, or other qualified persons with experience in agricultural management, for the operation of "proportional-profit" farms as described in detail in §§ 64-73 of the Act.

Following enactment of the Land Law, the Insular Legislature by Act No. 90, approved May 11, 1944, popularly called the "Vieques Act", made specific provisions for the relief of economic distress which it said existed on the small outlying islands of Vieques and Culebra, both municipalities of Puerto Rico. In its "Statement of Motives" this statute refers to the condemnation of some 20,000 acres of land on Vieques by the United States for Naval purposes (see *Baetjer et al. v. United States*, 1 Cir., 143 F.2d 391), which it said paralyzed the sugar industry on that island and caused acute economic distress to its inhabitants which could only be relieved by a renewal of that industry there, and the establishment thereon of a distillery, and then it provides:

"Section 1.—The Land Authority is directed and empowered to acquire, through purchase or condemnation proceedings, or in any other form or by any other means compatible with the laws of Puerto Rico, the lands belonging to the Eastern Sugar Associates in the Island of Vieques, as well as any other lands in the Island of Vieques, Puerto Rico, that may be necessary, in the judgment of the Land Authority of Puerto Rico, to carry out the provisions of this Act.

"Section 2.—As soon as the Land Authority acquires these lands from the Eastern Sugar Associates, it shall establish the consequent organization of the same and shall devote them principally to the planting of sugar cane and of any other products that may be necessary to develop in Vieques the sugar industry and the liquor industry."

With this brief outline of the most pertinent statutory provisions, we turn to the proceedings in the case at bar.

In accordance with the provisions of Act No. 26 of 1941, (The Land Law) the Governor of Puerto Rico on March 20, 1945, "representing The People of Puerto Rico, in the name and on order of the Land Authority," filed a petition in the District Court of the Judicial District of Humacao (an Insular Court) for the condemnation of the lands on the Island of Vieques here in litigation. In this petition it is alleged:

"3. The Land Authority desires to condemn the said lands to carry out all of the objects or purposes of the Land Law of Puerto Rico in force, that is to say:

"(a) Distribution and transfer of lands to a number of 'squatters' ('agregados') at the rate of one parcel of not less than one fourth of a cuerda nor more than three cuerdas per family, in which said 'squatters' may erect their dwellings, in harmony with the provisions of Title Fifth of the said Land Law.

"(b) Distribution and operation of lands in individual farms whose area shall fluctuate between five (5) and twenty-five (25) cuerdas, in harmony with the provisions of Title 25 and following of the said Land Law.

"(c) Establishment of farms of proportional benefit whose area shall fluctuate between one hundred (100) and five hundred (500) acres to be dedicated principally to the planting and cultivation of sugar cane in harmony with the provisions of Title Fifth of the said Land Law and Law numbered 90 approved May 11, 1944."

Then the petition goes on to characterize the above purposes as "of public utility" and to aver that the acquisition of the property "is also a public necessity"; that \$270,326.33 "is the just and reasonable compensation which the plaintiff should pay for the acquisition of the said properties, with all their plantations, improvements, uses, servitudes and appurtenances, as well as the buildings" thereon, and that the above sum has been deposited in the office of the Secretary of the Court for the use of the persons entitled thereto.

On the same day that this petition was filed, and also in accordance with the provisions of Act No. 26, supra, the Governor filed in the same court a Declaration of Taking in which it is recited that "the People of Puerto Rico have been requested to condemn" the properties owned by Eastern Sugar Associates on the Island of Vieques here involved; that condemnation is sought "under the authority of, and in conformity with" the Land Law, the Vieques Act, and the Insular Condemnation Act of March 12, 1903, Laws Puerto Rico 1903, p. 50, and that acquisition of the property "is for the purpose of executing the \* \* \* works and projects for the public use and public utility" as set out in Section 3, paragraphs (a), (b) and (c) of the petition which we have quoted above. On the day the petition and declaration were filed, the Humacao District Court entered a judgment vesting title to the lands in fee simple absolute in the Land Authority and giving it the right to immediate possession.

\* \* \*

On April 16, 1945, Eastern Sugar Associates filed a motion to dismiss and an answer, the motion based upon the ground, among others, that it appeared on the face of the complaint that the taking was not for a public use and purpose and thus violated rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and § 2 of the Organic Act of Puerto Rico, 48 U.S.C.A. § 737. On April 21, 1945, the

National City Bank of New York answered with a general denial of the material allegations in the complaint and a request that its mortgage lien be transferred to the compensation awarded in the event that judgment should be entered in favor of The People of Puerto Rico. After hearing arguments of counsel on the Associates' motion to dismiss, but taking no evidence, the District Court, on June 22, 1945, entered the order dismissing the petition for condemnation, and vacating and setting aside the judgment of taking and order of possession entered by the insular District Court, from which this appeal is taken.

Federal jurisdiction is clear upon either or both of the grounds advanced in support of the petitions for removal. We may therefore proceed directly to the merits.

No question is raised on this appeal as to the constitutional validity of the procedures provided by the insular statutes for the condemnation of land for the use of the Land Authority. Neither is there any question now before us with respect to the adequacy of the amount deposited to pay for the land involved. The basic question presented is whether on the pleadings it can be said that the appellees' land is sought to be taken for a public use. And this requires consideration of the nature as public or private of four possible uses to which the land here involved may, if acquired, be put, to wit, the three specific uses enumerated in the Land Law and in addition the more general use permitted by the Vieques Act. The reason for this is that the Land Law applies to Puerto Rico generally, including the Island of Vieques, and, while the Vieques Act applies only to the latter island, since it is not inconsistent or in conflict with, or repugnant to the Land Law, it does not supplant that law on Vieques, but instead supplements, enlarges and implements it to cope with the problems said to be peculiar to that island. Thus, since the lands are sought to be condemned "to carry out *all* (italics supplied) of the objects or purposes of the Land Law," and condemnation is sought both under that law and the Vieques Act, the lands may eventually be put, if the appellant prevails, to any one or all of the four uses. Therefore if any one of those uses, each considered, however, as part of a broad, integrated program of agrarian reform as will be pointed out hereafter, is not public, the petition was properly dismissed.

Before considering these uses, however, some general comments upon the power of the insular government to acquire property by eminent domain are in order.

Nowhere in the Puerto Rican Organic Act of March 2, 1917 (39 Stat. 951 et seq., 48 U.S.C.A. § 731 et seq.), is this power expressly conferred upon the insular government. The Organic

Act does, however, in § 25 vest all local legislative powers in the Puerto Rican Legislature, and in § 37 provide that the "legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable," and this grant of legislative power with respect to local matters the Supreme Court has said "is as broad and comprehensive as language could make it." *Puerto Rico v. Shell Co.*, 302 U.S. 253, 261, 58 S.Ct. 167, 171, 82 L.Ed. 235, see also *Puerto Rico v. Rubert Hermanos, Inc.*, 309 U.S. 543, 547, 548, 60 S.Ct. 699, 84 L.Ed. 916. In fact these cases stand for the proposition that, as to local matters, the legislative powers conferred upon the Insular Legislature by Congress are "nearly, if not quite, as extensive as those exercised by the state legislatures." *Puerto Rico v. Shell Co.*, *supra*, 302 U.S. 253, 262, 58 S.Ct. 171, 82 L.Ed. 235. See *Roig v. People of Puerto Rico*, 1 Cir., 147 F.2d 87, 91. Thus although the Organic Act does not contain a specific delegation of the power of eminent domain, nevertheless we think it clear that that power, as one characteristically governmental and therefore not dependent upon any specific grant (*Hanson Co. v. United States*, 261 U.S. 581, 587, 43 S.Ct. 442, 67 L.Ed. 809; *Georgia v. Chattanooga*, 264 U.S. 480, 44 S.Ct. 369, 68 L.Ed. 796) is by that Act vested in the Puerto Rican Legislature. Furthermore, should any doubt remain, the existence of that power is a necessary inference from the limitation upon its exercise imposed by § 2 of the Organic Act which we shall consider hereafter, and in addition the Insular Legislature at an early date assumed that it had the power by enacting the Puerto Rican Condemnation Act of March 12, 1903, and the Organic Act of 1917 provides (§ 57) that the laws and ordinances of Puerto Rico in force on the date of its enactment shall continue in force until altered, amended or repealed.

But the power of the Insular Legislature in this respect is not unlimited. In § 2 of the Organic Act, as already appears, Congress saw fit to allow the Insular Government to take or damage private property only for public use, and then only upon payment of just compensation, and furthermore in the same section it provided that "no law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law." We entertain no doubt that the "situation" of Puerto Rico, that is, its state of social, economic and political development, is such that under the doctrine of the Insular Cases (*De Lima v. Bidwell*, 182 U.S. 1, 21 S.Ct. 743, 45 L.Ed. 1041, and *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 188) as subsequently developed in *Hawaii v. Mankichi*, 190 U.S. 197, 23 S.

Ct. 737, 47 L.Ed. 1016; *Dorr v. United States*, 195 U.S. 138, 34 S. Ct. 808, 49 L.Ed. 128, 1 Ann.Cas. 697, and *Balzac v. Porto Rico*, 258 U.S. 298, 42 S.Ct. 343, 66 L.Ed. 627, Congress, in the exercise of its broad power under the Constitution (Art. IV, § 3) to establish an insular government for Puerto Rico, cannot deprive the inhabitants of Puerto Rico of the protection of the last two clauses of the Fifth Amendment. But this is an academic question. Whatever Congress might have done, it in fact saw fit to limit the powers of the Insular Government in the matter of taking private property in substantially the language of the Fifth Amendment. Consequently, the Fourteenth Amendment not being directly applicable because Puerto Rico is not a state (*Balzac v. Porto Rico*, supra) the question before us is to be resolved by reference to the pertinent provisions of either the Organic Act or the Fifth Amendment, it makes no difference which, because for present purposes their language may be regarded as identical.

It does not follow from this, however, that decisions interpreting the Fifth Amendment necessarily apply and those interpreting the Fourteenth Amendment do not. In fact the contrary is true. The reason for this is that the Fifth Amendment limits the powers of the Federal Government and thus decisions under it define "public use" by reference to the limited powers delegated to Congress to legislate within the states, whereas, the Constitutional power of Congress to legislate with respect to territories is comprehensive (*Keyes v. United States*, 73 App.D.C. 273, 119 F.2d 444, 448), and, as has been pointed out, in the exercise of that comprehensive power, Congress has conferred powers upon the Insular Government which are so all inclusive that they are "nearly, if not quite" as extensive as the general, residual powers of a state. As the Circuit Court of Appeals for the Sixth Circuit said in *United States v. Certain Lands in City of Louisville*, 6 Cir., 78 F.2d 684, 687, certiorari granted 296 U.S. 567, 56 S.Ct. 154, 80 L.Ed. 400; certiorari dismissed 297 U.S. 726, 56 S. Ct. 594, 80 L.Ed. 1009, "Decisions dealing with condemnation proceedings are to be considered in the light of the powers possessed by the sovereign seeking to exercise the right. What is a public use under one sovereign may not be a public use under another." Thus, although the Fourteenth Amendment does not itself apply, decisions under it dealing with the validity of state laws constitute the best available authorities in the present situation. *Roig v. People of Puerto Rico*, 1 Cir., 147 F.2d 87, 91.

To be sure the Fourteenth Amendment does not in terms limit the powers of state governments to takings of private property for "public use" only, as § 2 of the Organic Act limits the power

of the Puerto Rican government, but this does not mean that § 2 of the Organic Act imposes an additional or stricter limitation upon the Insular Government than the Fourteenth Amendment imposes upon state governments. The reason for this is that the public use requirement of the Fifth Amendment, which for present purposes is identical with the public use requirement of the Organic Act, has been read into the due process clause of the Fourteenth Amendment. See *Fallbrook Irrigation District v. Bradley*, 1896, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369; *Clark v. Nash*, 1905, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085, 4 Ann.Cas. 1171. It is therefore clear that the ultimate test imposed by § 2 of the Organic Act, as well as by the Fourteenth Amendment, is a due process test and thus it is immaterial whether the limiting criteria are stated in terms of "due process of law" or in terms of "public use". In sum, the limitations imposed upon the Insular Government by § 2 of the Puerto Rican Organic Act are substantially the same as the limitations imposed upon the state governments by the Fourteenth Amendment, and therefore, as the powers held by the Insular Government are analogous to the powers held by the governments of the individual states, the Insular Government's power of eminent domain is entitled to the same scope that has been given to the power of eminent domain possessed by the state governments.

This brings us to the concrete question of the nature of the uses to which the Insular Government proposes to put the appellees' lands. But at the threshold of our consideration of this question, we come face to face with the question upon which the Supreme Court was apparently divided in *United States ex rel. Tennessee Valley Authority v. Welch et al.*, 66 S.Ct. 715, that is, the question whether a legislative decision that a taking is for a public use is subject to judicial review. However, we do not feel that we have to attempt to answer this question, because even if it is one within our competence, we think the taking here attempted does not violate "due process."

The four contemplated uses for the land enumerated above are closely inter-related. Each use plays a part in a comprehensive program of social and economic reform. Thus we see no basis for analyzing each proposed use separately. Instead we think the entire legislation should be regarded "as a single integrated effort," *United States ex rel. Tennessee Valley Authority v. Welch*, 66 S.Ct. 718, to improve conditions on the island, and so viewed we think enactment of the statutes within the power of the Insular Legislature.

We are not, of course, concerned with the wisdom, expediency or even directly with the necessity of the uses for which the land is proposed to be taken. These are legislative questions with which it is clearly established we have nothing whatever to do. "The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." *Chicago, B. & Quincy R. Co. v. McGuire*, 219 U.S. 549, 569, 31 S.Ct. 259, 263, 55 L.Ed. 328. See also *Rindge Co. v. Los Angeles*, 262 U.S. 700, 709, 43 S.Ct. 689, 67 L.Ed. 1186, and cases cited. Our sole concern is with the question whether the Insular Legislature exceeded its power, specifically, whether the proposed taking deprives the appellees of their property without due process of law.

The argument is made that due process is denied because the purpose for taking the appellees' land is only to sell or lease it to others for them to use personally instead of for use by the general public. This argument has been advanced several times in the Supreme Court of the United States in cases of this sort and every time it has been rejected. In *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 162, 17 S.Ct. 56, 64, 41 L.Ed. 369, decided in 1896, the Supreme Court considered the argument fully and in the light of that consideration announced that "It is not necessary, in order that the use should be public, that every resident in the district should have the right to the use of the water." It was considered, and rejected again in *Clark v. Nash*, 1905, 198 U.S. 361, 367, 25 S.Ct. 676, 49 L.Ed. 1085, 4 Ann.Cas. 1171 et seq., and in *Strickley v. Highland Boy Mining Co.*, 1906, 200 U.S. 527, 531, 26 S.Ct. 301, 50 L.Ed. 581, 4 Ann.Cas. 1174; and in 1916 in *Mt. Vernon Cotton Co. v. Alabama Power Co.*, 240 U.S. 30, 32, 36 S.Ct. 234, 236, 60 L.Ed. 507, Mr. Justice Holmes speaking for a unanimous court said: "The inadequacy of use by the general public as a universal test is established." Then later in 1923 in *Rindge Co. v. Los Angeles*, *supra*, page 707 of 262 U.S., 43 S.Ct. 692, 67 L.Ed. 1186, the Supreme Court said: "It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use."

It does not follow from this, however, that a taking of property from one, for the purpose of transferring it to another, without anything more, conforms to due process of law. Some public benefit or advantage must accrue from the transfer and mere financial gain to the taker is not enough, since the Supreme Court has intimated that the power of eminent domain cannot be used by the taking authority in aid of "an outside land speculation." *Brown v. United States*, 263 U.S. 78, 84, 44 S.Ct. 92, 94, 68 L.Ed. 171. But the local Legislatures nevertheless have wide scope in deciding what takings are for a public use. This is definitely established by the cases arising under the Fourteenth Amendment already cited and by many more. In the first place a state's power of eminent domain does not necessarily have to be rested upon the ground that the taking is considered necessary for the public health, but may be exercised if the taking "be essential or material for the prosperity of the community." *Fallbrook Irrigation District case*, 164 U.S. page 163, 17 S.Ct. 65, 41 L.Ed. 369. And in the second place a local Legislature, because of its intimate knowledge of local conditions, has great latitude in determining what uses of land are conducive to community prosperity. The wide scope allowed a state Legislature in this respect is emphasized in *Clark v. Nash*, *supra*, and in *Cincinnati v. Vester*, 281 U.S. 439, 446, 50 S.Ct. 360, 362, 74 L.Ed. 950, decided in 1930, the Supreme Court, citing many cases, said that although the question of what is a public use is a judicial one "In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies." In fact in *Old Dominion Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 40, 70 L.Ed. 162, cited with approval in *United States, ex rel. Tennessee Valley Authority, v. Welch*, *supra*, the Supreme Court said that a legislative decision that a given use is public "is entitled to deference until it is shown to involve an impossibility."

In view of these principles we cannot strike down the legislative program for the Island of Vieques as in violation of the appellees' right to due process of law. That program, in part, may be radical in that if carried out it will put the Insular Government in business in direct competition with the appellee Eastern Sugar Associates. This may be, as the appellees contend, "state socialism." But concrete cases are not to be decided by calling names. Our function is to pass upon the statutes before us without regard to our views of the wisdom of the political theory underlying them; (*McLean v. Arkansas*, 211 U.S. 539, 547, 29 S.Ct.

206, 53 L.Ed. 315) it is our duty to determine whether their enactment rested upon an arbitrary belief of the existence of the evils they were intended to remedy, and whether the means chosen are reasonably calculated to cure the evils reasonably believed by the Legislature to exist. *Tanner v. Little*, 240 U.S. 369, 385, 36 S.Ct. 379, 60 L.Ed. 691. And thus, although we cannot substitute our estimate of the extent of the evils aimed at for that of the Insular Legislature, we are required to make some inquiry into the facts with reference to which the Legislature acted.

No such inquiry was made by the court below. It ordered the condemnation petition dismissed on motion without taking any evidence because of its erroneous view that there could be no public use for the reason that the property was not intended to be devoted to use by the public generally. But this does not require remand of the case for the purpose of taking evidence and making findings with respect to the facts alleged in the statements of motives included in the statutes under consideration. "Our function is only to determine the reasonableness of the Legislature's belief in the existence of evils and in the effectiveness of the remedy provided. In performing this function we have no occasion to consider whether all the statements of fact which may be the basis of the prevailing belief are well-founded; and we have, of course, no right to weigh conflicting evidence." It seems to us that the reasonableness of the Insular Legislature's belief in the existence of the evils it attempted to cure is amply attested by social and economic conditions in Puerto Rico generally, and on the Island of Vieques in particular, so well known that we, at least as a court having appellate powers over the Supreme Court of Puerto Rico and hence as a sort of insular court, may notice them judicially.

Puerto Rico, including its adjacent islands, is small in area and densely populated, and that congested population is largely dependent upon the land for its livelihood. *Puerto Rico v. Rubert Hermanos, Inc.*, 309 U.S. 543, 548, 60 S.Ct. 699, 84 L.Ed. 916. But it is not directly dependent upon the land because the basic agricultural crop is sugar cane. Indeed it is no secret that sugar dominates the whole insular economy. And the exigencies of sugar cane growing and grinding, which must be done promptly after the cane is cut, are such that rural landholdings have tended to become large and the majority of the workers thereon employable for only a few weeks during the year. Then, in addition to the foregoing, the economy of the Island of Vieques has been disrupted by the withdrawal of a substantial part of its best agricultural land for naval purposes, see *Baetjer et al. v. United States*, 1 Cir., 143 F.2d 391, thereby rendering it commercially

expedient to transport the relatively small amount of cane still grown on that island to Puerto Rico proper for grinding instead of grinding it locally as had been done in the past. Were it necessary we might even go further and point to the plight of Puerto Rico during the late war brought to our attention in *Buscaglia v. District Court of San Juan*, 1 Cir., 145 F.2d 274. But enough has been said to indicate both that the Puerto Rican Legislature's belief in the existence of a serious economic and social problem was not arbitrary, and that the program to provide not only homesteads and proportional profit farms for *agregados* and subsistence farms for more skilled farmers, on the Island of Puerto Rico proper, but, in addition to the foregoing, to provide for the renewal of sugar cane grinding and the development of the liquor industry on the Island of Vieques, embodied means reasonably calculated to deal with these problems. \* \* \*

The order of the District Court is set aside and the case remanded to that Court for further proceedings not inconsistent with this opinion.

#### NOTE

1. It is not essential to the existence of a public use that the use be by a public governmental agency, *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 10 S.Ct. 965, 34 L.Ed. 295 (1890); *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905). Nor does its proposed use by such body mean that the requisite use is present, *In re Opinion of the Justices*, 204 Mass. 607, 91 N.E. 405 (1910); *Pennsylvania Mut. Life Ins. Co. v. Philadelphia*, 242 Pa. 47, 88 A. 904 (1913). Condemnation of one person's property for use by another private person has been sustained where the latter's use is one involving widespread general public benefit even though the general public is given no right to use the property, *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906); cf. *Missouri Pac. R. Co. v. Nebraska*, 164 U.S. 403, 17 S.Ct. 130, 41 L.Ed. 489 (1896) (use of the property for private grain elevator not a public use). *A fortiori* is the requisite use present where the general public may avail itself of the services in connection with which such property is to be used, *Union Lime Co. v. Chicago & N. W. R. Co.*, 233 U.S. 211, 34 S.Ct. 522, 58 L.Ed. 924 (1914) (railroad spur track becoming part of railroad's system). It has been held that private property may be condemned to be transferred to other private persons as compensation for property taken from the latter, where this was the best means for making the latter whole, *Brown v. U. S.*, 263 U.S. 78, 44 S.Ct. 92, 68 L.Ed. 171 (1923). So far as the states are limited in exercising their power of eminent domain by the due process clause of the Fourteenth Amendment, the Supreme Court generally accepts the decisions of the state courts as to the uses for which the state may authorize the condemnation of private property; see *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369 (1896).

2. See Note, Eminent Domain—Public Use, 13 Cornell L.Quar. 88 (1927); Note, Eminent Domain—Public Purpose—Excess Condemnation, 18 Calif.L.Rev. 284 (1930); Note, The Constitutionality of Excess Condemnation, 46 Col.L.Rev. 109 (1946).

3. The United States may condemn property if necessary to carry into execution any of its powers, *U. S. v. Gettysburg Electric R. Co.*, 160 U.S. 668, 16 S.Ct. 427, 40 L.Ed. 576 (1895). In *U. S. v. Welch*, 327 U.S. 546, 66 S.Ct. 715, 90 L.Ed. 843 (1946), Mr. Justice Black, in the Court's opinion, stated that "We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory power. It is true that this Court did say in *City of Cincinnati v. Vester*, 281 U.S. 439, 50 S.Ct. 360, 74 L.Ed. 950, that 'It is well established that, in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.' But the Court's judgment in that case denied the power to condemn 'excess' property on the ground that the state law had not authorized it. \* \* \* But whatever may be the scope of the judicial power to determine what is a 'public use' in Fourteenth Amendment controversies, this Court has said that when Congress has spoken on this subject 'Its decision is entitled to deference until it is shown to involve an impossibility.' Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." Mr. Justice Reed, in his concurring opinion objected to the view that the question of what is a public use is for Congress to determine. Mr. Justice Frankfurter, in a concurring opinion, states that he joins in the Court's opinion because he does not read it as does Mr. Justice Reed.

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### UNITED STATES v. CAUSBY.

Supreme Court of the United States, 1946.  
328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206.

Mr. Justice DOUGLAS delivered the opinion of the Court.

This is a case of first impression. The problem presented is whether respondents' property was taken within the meaning of the Fifth Amendment by frequent and regular flights of army and navy aircraft over respondents' land at low altitudes. The Court of Claims held that there was a taking and entered judgment for respondent, one judge dissenting. 60 F.Supp. 751. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

Respondents own 2.8 acres near an airport outside of Greensboro, North Carolina. It has on it a dwelling house, and also various outbuildings which were mainly used for raising chickens.

The end of the airport's northwest-southeast runway is 2,220 feet from respondents' barn and 2,275 feet from their house. The path of glide to this runway passes directly over the property—which is 100 feet wide and 1,200 feet long. The 30 to 1 safe glide angle approved by the Civil Aeronautics Authority passes over this property at 83 feet, which is 67 feet above the house, 63 feet above the barn and 18 feet above the highest tree. The use by the United States of this airport is pursuant to a lease executed in May, 1942, for a term commencing June 1, 1942 and ending June 30, 1942, with a provision for renewals until June 30, 1967, or six months after the end of the national emergency, whichever is the earlier.

Various aircraft of the United States use this airport—bombers, transports and fighters. The direction of the prevailing wind determines when a particular runway is used. The northwest-southeast runway in question is used about four per cent of the time in taking off and about seven per cent of the time in landing. Since the United States began operations in May, 1942, its four-motored heavy bombers, other planes of the heavier type, and its fighter planes have frequently passed over respondents' land and buildings in considerable numbers and rather close together. They come close enough at times to appear barely to miss the tops of the trees and at times so close to the tops of the trees as to blow the old leaves off. The noise is startling. And at night the glare from the planes brightly lights up the place. As a result of the noise, respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright. The total chickens lost in that manner was about 150. Production also fell off. The result was the destruction of the use of the property as a commercial chicken farm. Respondents are frequently deprived of their sleep and the family has become nervous and frightened. Although there have been no airplane accidents on respondents' property, there have been several accidents near the airport and close to respondents' place. These are the essential facts found by the Court of Claims. On the basis of these facts, it found that respondents' property had depreciated in value. It held that the United States had taken an easement over the property on June 1, 1942, and that the value of the property destroyed and the easement taken was \$2,000.

I. The United States relies on the Air Commerce Act of 1926, 44 Stat. 568, 49 U.S.C. § 171 et seq., 49 U.S.C.A. § 171 et seq., as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. § 401 et seq., 49 U.S.C.A. § 401 et seq. Under those statutes the United States has "complete and exclusive national sovereignty in the air space" over this country. 49 U.S.C. §

176(a), 49 U.S.C.A. § 176(a). They grant any citizen of the United States "a public right of freedom of transit in air commerce through the navigable air space of the United States." 49 U.S.C. § 403, 49 U.S.C.A. § 403. And "navigable air space" is defined as "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority." 49 U.S.C. § 180, 49 U.S.C.A. § 180. And it is provided that "such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation." *Id.* It is, therefore, argued that since these flights were within the minimum safe altitudes of flight which had been prescribed, they were in exercise of the declared right of travel through the airspace. The United States concludes that when flights are made within the navigable airspace without any physical invasion of the property of the landowners, there has been no taking of property. It says that at most there was merely incidental damage occurring as a consequence of authorized air navigation. It also argues that the landowner does not own superadjacent airspace which he has not subjected to possession by the erection of structures or other occupancy. Moreover, it is argued that even if the United States took airspace owned by respondents, no compensable damage was shown. Any damages are said to be merely consequential for which no compensation may be obtained under the Fifth Amendment.

It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

But that general principle does not control the present case. For the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336, 147 A.L.R. 55. Market value fairly determined is the normal measure of the recovery. *Id.* And that value may reflect the use to which the land could readily be converted, as well as the existing use.

United States v. Powelson, 319 U.S. 266, 275, 63 S.Ct. 1047, 1053, 87 L.Ed. 1390, and cases cited. If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.

We agree that in those circumstances there would be a taking. Though it would be only an easement of flight which was taken, that easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest. It would be a definite exercise of complete dominion and control over the surface of the land. The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed. It would not be a case of incidental damages arising from a legalized nuisance such as was involved in *Richards v. Washington Terminal Co.*, 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088, L.R.A.1915A, 887. In that case property owners whose lands adjoined a railroad line were denied recovery for damages resulting from the noise, vibrations, smoke and the like, incidental to the operations of the trains. In the supposed case the line of flight is over the land. And the land is appropriated as directly and completely as if it were used for the runways themselves.

There is no material difference between the supposed case and the present one, except that here enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value. That was the philosophy of *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287. In that case the petition alleged that the United States erected a fort on nearby land, established a battery and a fire control station there, and fired guns over petitioner's land. The Court, speaking through Mr. Justice Holmes, reversed the Court of Claims which dismissed the petition on a demurrer, holding that "the specific facts set forth would warrant a finding that a servitude has been imposed." 260 U.S. at page 330, 43 S.Ct. at page 137, 67 L.Ed. 287.

The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority." 49 U.S.C. § 180, 49 U.S.C.A. § 180. If that agency prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the authority is 500 feet during the day and 1000 feet at night for air carriers (Civil Air Regulations, Pt. 61, §§ 61.7400, 61.7401, Code Fed.Reg.Cum.Supp., Tit. 14, ch. 1) and from 300 to 1000 feet for other aircraft depending on the type of plane and the character of the terrain. *Id.*, Pt. 60, §§ 60.350-60.3505, Fed.Reg.Cum.Supp., *supra*. Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight.

We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. See *Hinman v. Pacific Air Transport*, 9 Cir., 84 F.2d 755. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a

more conventional entry upon it. We would not doubt that if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.

In this case, as in *Portsmouth Harbor Land & Hotel Co. v. United States*, supra, the damages were not merely consequential. They were the product of a direct invasion of respondents' domain. As stated in *United States v. Cress*, 243 U.S. 316, 328, 37 S.Ct. 380, 385, 61 L.Ed. 746, "\* \* \* it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

We said in *United States v. Powelson*, supra, 319 U.S. at page 279, 63 S.Ct. at page 1054, 87 L.Ed. 1390, that while the meaning of "property" as used in the Fifth Amendment was a federal question, "it will normally obtain its content by reference to local law." If we look to North Carolina law, we reach the same result. Sovereignty in the airspace rests in the State "except where granted to and assumed by the United States." Gen.Stats.1943, § 63-11. The flight of aircraft is lawful "unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath." Id., § 63-13. Subject to that right of flight, "ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath." Id. § 63-12. Our holding that there was an invasion of respondents' property is thus not inconsistent with the local law governing a landowner's claim to the immediate reaches of the superadjacent airspace.

The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of the Court of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.

II. By § 145(1) of the Judicial Code, 28 U.S.C. § 250(1), 28 U.S.C.A. § 250(1), the Court of Claims has jurisdiction to hear and determine "All claims (except for pensions) founded upon the Constitution of the United States or \* \* \* upon any contract, express or implied, with the Government of the United States."

We need not decide whether repeated trespasses might give rise to an implied contract. Cf. *Portsmouth Harbor Land & Hotel Co. v. United States*, *supra*. If there is a taking, the claim is "founded upon the Constitution" and within the jurisdiction of the Court of Claims to hear and determine. \* \* \*

III. The Court of Claims held, as we have noted, that an easement was taken. But the findings of fact contain no precise description as to its nature. It is not described in terms of frequency of flight, permissible altitude, or type of airplane. Nor is there a finding as to whether the easement taken was temporary or permanent. Yet an accurate description of the property taken is essential, since that interest vests in the United States. *United States v. Cress*, *supra*, 243 U.S. 328, 329, 37 S.Ct. 385, 386, 61 L.Ed. 746, and cases cited. It is true that the Court of Claims stated in its opinion that the easement taken was permanent. But the deficiency in findings cannot be rectified by statements in the opinion. *United States v. Esnault-Pelterie*, 299 U.S. 201, 205, 206, 57 S.Ct. 159, 161, 162, 81 L.Ed. 123; *United States v. Seminole Nation*, 299 U.S. 417, 422, 57 S.Ct. 283, 287, 81 L.Ed. 316. Findings of fact on every "material issue" are a statutory requirement. 53 Stat. 752, 28 U.S.C. § 288, 28 U.S.C.A. § 288. The importance of findings of fact based on evidence is emphasized here by the Court of Claims' treatment of the nature of the easement. It stated in its opinion that the easement was permanent because the United States "no doubt in-

tended to make some sort of arrangement whereby it could use the airport for its military planes whenever it had occasion to do so." [60 F.Supp. 758.] That sounds more like conjecture rather than a conclusion from evidence; and if so, it would not be a proper foundation for liability of the United States. We do not stop to examine the evidence to determine whether it would support such a finding, if made. For that is not our function. *United States v. Esnault-Pelterie*, supra, 299 U.S. at page 206, 57 S.Ct. at page 162, 81 L.Ed. 123.

Since on this record it is not clear whether the easement taken is a permanent or a temporary one, it would be premature for us to consider whether the amount of the award made by the Court of Claims was proper.

The judgment is reversed and the cause is remanded to the Court of Claims so that it may make the necessary findings in conformity with this opinion.

Reversed.

Mr. Justice BLACK dissented in an opinion joined in by Justice BURTON.

#### NOTE

1. The due process clause of the Fourteenth Amendment does not require a state to make compensation for the indirect and consequential damages resulting from its exercises of its powers, *Manigault v. Springs*, 199 U.S. 473, 26 S.Ct. 127, 50 L.Ed. 274 (1905); nor does the Fifth Amendment require the United States to make compensation for such damage, *Gibson v. U. S.*, 166 U.S. 269, 17 S.Ct. 578, 41 L.Ed. 996 (1896); *Peabody v. U. S.*, 231 U.S. 530, 34 S.Ct. 159, 58 L.Ed. 351 (1913).

2. The law must recognize that which is alleged to be taken as a property right before the public's act can be deemed a taking of property. As to the meaning of the term "property," the Supreme Court will generally follow the law of the state in which the property is situated, *Sauer v. New York*, 206 U.S. 536, 27 S.Ct. 686, 51 L.Ed. 1176 (1907); *U. S. v. Powelson*, 319 U.S. 266, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943). For cases in which the duty to make compensation was denied because the complainant had no property right that was being taken, see in addition to the case just cited, *U. S. v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 33 S.Ct. 667, 57 L.Ed. 1063 (1913); *U. S. v. Willow River Power Co.*, 324 U.S. 499, 65 S.Ct. 761, 89 L.Ed. 1101 (1945).

3. The acts of the public are sometimes held not to involve a taking of private property because those acts are merely the exercise of a superior public right or power. This approach has been frequently used in cases involving public regulation and promotion of navigation on navigable public waters; see *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 33 S.Ct. 679, 57 L.Ed. 1083 (1913); *Greenleaf-Johnson Lbr. Co. v. Garrison*, 237 U.S. 251,

35 S.Ct. 551, 59 S.Ct. 939 (1915); *U. S. v. Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 61 S.Ct. 772, 85 L.Ed. 1064 (1941).

For additional cases holding that acts of the public, or by its authority, amounted either to a permanent physical invasion of private property, or to the imposition upon it of what amounted to a servitude, see *U. S. v. Lynah*, 188 U.S. 445, 23 S.Ct. 349, 47 L. Ed. 549 (1903); *U. S. v. Cress*, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746 (1917); *U. S. v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L. Ed. 1272 (1947).

4. See J. M. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 *Yale L.Jour.* 221 (1931); M. Colvin, *Property which Cannot be Reached by Power of Eminent Domain for a Public Use or Purpose*, 78 *U.Pa.L.Rev.* 1, 137 (1929).

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### UNITED STATES v. MILLER.

Supreme Court of the United States, 1943.  
317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336.

Mr. Justice ROBERTS delivered the opinion of the Court.

This case presents important questions respecting standards for valuing property taken for public use. For this reason, and because of an apparent conflict with one of our decisions, we granted certiorari, 316 U.S. 657, 62 S.Ct. 1290, 86 L.Ed. 1736.

The United States condemned a strip across the respondents' lands for tracks of the Central Pacific Railroad, relocation of which was necessary on account of the prospective flooding of the old right-of-way by waters to be impounded by the Central Valley Reclamation Project in California. For many years a proposal to initiate state reclamation works in this vicinity had been before the people of the State. In 1932 they voted approval and authorization of the project. It was, however, subsequently adopted by the United States as a federal project.

April 6, 1934, the Chief of Engineers of the Army recommended that the Government contribute twelve million dollars towards the project. Congress authorized the appropriation in the following year. December 22, 1935, the President approved construction of the entire improvement. In 1936 Congress appropriated \$6,900,000 for it and in 1937 \$12,500,000. In August 1937 the project was again authorized by Congress.

In his report for the fiscal year ending June 30, 1937, the Secretary of the Interior stated that Shasta, California, had been selected for the site of the Sacramento River dam. Its construction involved relocation of some thirty miles of the line of the railroad.

Portions of respondents' lands were required for the relocated right-of-way. Alternate routes were surveyed by March 1936 and staked at intervals of 100 feet. Prior to the authorization of the project, the area of which respondents' tracts form a part was largely uncleared brush land. In the years 1936 and 1937 certain parcels were purchased with the intention of subdividing them and, in 1937, subdivisions were plotted and there grew up a settlement known as Boomtown, in which the respondents' lands lie. Two of the respondents were realtors interested in developing the neighborhood. By December 1938 the town had been built up for business and residential purposes.

December 14, 1938, the United States filed in the District Court for Northern California a complaint in eminent domain against the respondents and others whose lands were needed for the relocation of the railroad. On that day the Government also filed a declaration of taking. In this declaration the estimate of just compensation to be paid for a tract belonging to three of the respondents as co-tenants was estimated at \$2,550 and that sum was deposited in court. On the application of these owners the court directed the Clerk to pay each of them one-third of the deposit, or \$850, on account of the compensation they were entitled to receive.

The action in eminent domain was tried to a jury. The respondents offered opinion evidence as to the fair market value of the tracts involved and also as to severance damage to lots of which portions were taken. Each witness was asked to state his opinion as to market value of the land taken as at December 14, 1938, the date of the filing of the complaint. Government counsel objected to the form of the question on the ground that, as the United States was definitely committed to the project August 26, 1937, the respondents were not entitled to have included in an estimate of value, as of the date the lands were taken, any increment of value due to the Government's authorization of, and commitment to, the project. The trial court sustained the objection and required the question to be reframed so as to call for market value at the date of the taking, excluding therefrom any increment of value accruing after August 26, 1937, due to the authorization of the project. Under stress of the ruling, and over objection and exception, questions calling for opinion evidence were phrased to comply with the court's decision. The jury rendered verdicts in favor of various respondents.

The three respondents who had received \$850 each on account of compensation were awarded less than the total paid them. The court entered judgment that title to the lands was in the

United States and judgment in favor of respondents respectively for the amounts awarded them. Judgment was entered against the three respondents and in favor of the United States for the amounts they had received in excess of the verdicts with interest. They moved to set aside the money judgments against them on the ground that the court had no jurisdiction to enter them. The motions were overruled. All the respondents appealed, assigning error to the trial judge's ruling with respect to the questions to be asked the witnesses, to his charge which had instructed the jury that, in arriving at market value as of the date of taking, they should disregard increment of value *due to the initiation of the project* and arising after August 26, 1937, and three of them to his entry of money judgments for the United States.

The Circuit Court of Appeals reversed the judgment holding, by a divided court, that the trial judge erred in his rulings and in his charge, and unanimously that the District Court was without jurisdiction to award the United States a judgment for amounts overpaid. A majority of the court were of opinion the witnesses should have been asked to state the fair market value of the lands as of the date of taking without qualification, and the judge should have charged that this value measured the compensation to which the respondents were entitled.

1. The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.

It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the "value", the "market value", and the "fair market value" of what is taken. The term "fair" hardly adds anything to the phrase "market value", which denotes what "it fairly may be believed that a purchaser in fair market conditions would have given", or, more concisely, "market value fairly determined".

Respondents correctly say that value is to be ascertained as of the date of taking. But they insist that no element which goes to make up value as at that moment is to be discarded or eliminated. We think the proposition is too broadly stated.

Where, for any reason, property has no market resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety. It is usually said that market value is what a willing buyer would pay in cash to a willing seller. Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant amounts, the application of this concept involves, at best, a guess by informed persons.

Again, strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case, as where the formula is attempted to be applied as between an owner who may not want to part with his land because of its special adaptability to his own use, and a taker who needs the land because of its peculiar fitness for the taker's purposes. These elements must be disregarded by the fact finding body in arriving at "fair" market value.

Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker. Thus although the market value of the property is to be fixed with due consideration of all its available uses, its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value. The district judge so charged the jury and no question is made as to the correctness of the instruction.

There is, however, another possible element of market value, which is the bone of contention here. Should the owner have the benefit of any increment of value added to the property taken by the action of the public authority in previously condemning adjacent lands? If so, were the lands in question so situate as to entitle respondents to the benefit of this increment?

Courts have had to adopt working rules in order to do substantial justice in eminent domain proceedings. One of these is that a parcel of land which has been used and treated as an entity shall be so considered in assessing compensation for the taking of part or all of it.

This has begotten subsidiary rules. If only a portion of a single tract is taken the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract. Such damage is often, though somewhat loosely, spoken of as severance damage. On the other hand, if the taking has in fact benefited the remainder the benefit may be set off against the value of the land taken.

As respects other property of the owner consisting of separate tracts adjoining that affected by the taking, the Constitution has never been construed as requiring payment of consequential damages; and unless the legislature so provides, as it may, benefits are not assessed against such neighboring tracts for increase in their value.

If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities.

In which category do the lands in question fall? The project, from the date of its final and definite authorization in August 1937, included the relocation of the railroad right-of-way, and one probable route was marked out over the respondents' lands. This being so, it was proper to tell the jury that the respondents were entitled to no increase in value arising after August 1937 because of the likelihood of the taking of their property. If their lands were probably to be taken for public use, in order to complete the project in its entirety, any increase in value due to that fact could only arise from speculation by them, or by possible purchasers from them, as to what the Government would be compelled to pay as compensation.

*Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 392, 37 L.Ed. 170, is directly in point and supports this view not-

withstanding respondents' efforts to distinguish the case. There Congress, in 1890, authorized commissioners to establish a park along Rock Creek in the District of Columbia and, for that purpose, to select not exceeding two thousand acres of land. In 1891 the commissioners prepared a map of the lands to be acquired, which was approved by the President as required by the statute. Proceedings were brought to condemn certain tracts lying within the mapped area. The Supreme Court of the District instructed the appraisers, whom the Act made the triers of fact, that they "shall receive no evidence tending to prove the prices actually paid on sales of property similar to that included in said park, and so situated as to adjoin it or to be within its immediate vicinity, when such sales have taken place since the passage of the act \* \* \* authorizing said park. \* \* \*". The instruction was approved by this court.

The majority of the court below thought the case distinguishable in the view that the boundaries of the park were fixed by the Act of Congress authorizing the project and, therefore, it was known what land would lie inside, and what outside, the park from the beginning, and that land taken for the park should not have the benefit of an increase in value which adjoining land might enjoy through its proximity to the improvement. This, of course, would be true if the lines of the park had, in the beginning, been fixed, because property lying outside the boundaries of the park, and not intended to be taken, would be dissimilar from that lying within it, the one gaining value by proximity and the other gaining nothing from the fact that it was to be taken from its owner. Such was the ruling of the court in *Kerr v. South Park Commissioners*, 117 U.S. 379, 387, 6 S.Ct. 801, 805, 29 L.Ed. 924. From the citation of that case in the *Shoemaker* opinion the majority below inferred that the two presented like facts. But, in the *Kerr* case, the lines of the park had been determined, whereas, in the *Shoemaker* case, the Act authorized the appropriation of a fixed acreage within a larger area. Consequently any land lying within that area was likely to be taken. If a tract happened not to be taken, because not within the limits finally fixed, it might show an increase in readily realizable market value by reason of proximity to the improvement. In the *Shoemaker* case the court excluded any increment of value arising out of the fact that Congress had authorized the location and condemnation of land for the park, for the very reason that *Shoemaker's* property lay in the area within which the park was to be laid out. If, in the instant case, the respondents' lands were, at the date of the authorizing Act, clearly within the confines of the project, the respond-

ents were entitled to no enhancement in value due to the fact that their lands would be taken. If they were within the area where they were likely to be taken for the project, but might not be, the owners were not entitled, if they were ultimately taken, to an increment of value calculated on the theory that if they had not been taken they would have been more valuable by reason of their proximity to the land taken. In so charging the jury the trial court was correct.

The respondents assert that a different rule should have been applied in respect of severance damage even if the court's rulings were correct as to the valuation of land taken. In the light of what has already been said, we find no merit in the contention. \* \* \*

The judgment of the Circuit Court of Appeals is reversed and that of the District Court affirmed.

Reversed.

#### NOTE

1. Other important cases considering what constitutes fair compensation include *Bauman v. Ross*, 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270 (1897) (compensation includes damages to part of a tract that is not taken); *Campbell v. U. S.*, 266 U.S. 368, 45 S.Ct. 115, 69 L.Ed. 328 (1924) (damage from use of adjoining lands of others taken for same project not includible); *U. S. v. Powelson*, 319 U.S. 266, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943) (speculative value not includible, nor need loss of business opportunity based on unexercised power of eminent domain held by condemnee be paid for); *U. S. v. Gen. Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945) (measure of compensation where property taken is the temporary occupancy of a building equipped for condemnee's business); *U. S. v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946) (compensation where entire remainder of a leasehold is taken).

2. C. T. McCormick, *The Measure of Compensation in Eminent Domain*, 14 Minn.L.Rev. 461 (1933); R. L. Hale, *Value to the Taker in Condemnation Cases*, 31 Col.L.Rev. 1 (1931).

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#### SWEET v. RECHEL.

Supreme Court of United States, 1895. 159 U.S. 380, 16 S.Ct. 43, 40 L.Ed. 188.

[Error to United States Circuit Court for Massachusetts. Plaintiff sued to recover from defendant land in Boston held by defendant under a title derived from condemnation proceedings taken by the city of Boston under legislative authority. For the public health the city was empowered to take and raise the grade of certain submerged land privately owned. The city was

to file with the county register of deeds a description of the land thus taken, with a statement of the taking, and thereupon title was to vest in the city. Any owner of land so taken who agreed with the city upon his damages was to have them paid forthwith by the city, and any other person interested was authorized within one year from said taking to file a bill in equity to have his damages ascertained by commissioners under judicial direction, and to have an execution against the city for the damages thus ascertained. Plaintiff alleged the invalidity of title derived under this proceeding and took this writ from a judgment in favor of defendant.]

Mr. Justice HARLAN. \* \* \* But must compensation be actually made or tendered in advance of such taking or appropriation? Is it not sufficient, in order to meet the requirements of the Constitution, if adequate provision be made for compensation?

The Constitutions of some of the states expressly require that compensation be first made to the owner before the rights of the public can attach. But neither the Constitution of Massachusetts nor the Constitution of the United States contains any such provision. The former only requires that the owner "shall receive a reasonable compensation"; the latter, that private property shall not be taken for public use "without just compensation." Reasonable compensation and just compensation mean the same thing.

In *Haverhill Bridge Prop'rs v. County Com'rs*, 103 Mass. 120, 124, 4 Am.Rep. 518, the court said: "The duty of paying an adequate compensation for private property taken is inseparable from the exercise of the right of eminent domain. The act granting the power must provide for compensation, and a ready means of ascertaining the amount. Payment need not precede the seizure, but the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay."

A leading case upon this point is *Connecticut River R. R. v. Franklin Com'rs*, 127 Mass. 50, 52, 56, 34 Am.Rep. 338. That case arose under a statute of Massachusetts authorizing the manager of a railroad owned by the commonwealth to take land for a passenger station to be used by that and other railroads, and providing no other mode of compensation to the owner than that the land should be paid for out of the earnings of the railroad. The statute was held to be void.

The court said: "It has long been settled by the decisions of this court, that a statute which undertakes to appropriate private property for a public highway of any kind, without adequate provision for the payment of compensation, is unconstitutional."

owner without his consent,"—citing among other cases *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray, Mass., 1, 37. Again: "Statutes taking private property for a public highway, and providing for the ascertaining of the damages, and for payment thereof out of the treasury of the county, town, or city, have often been held to be constitutional. But, in the cases in which it has been so held, the liability to pay the damages rested upon the whole property of the inhabitants of the municipality, and might be enforced by writ of execution or warrant of distress, or by mandamus to compel the levy of a general tax. The rule has not been extended to cases in which only a special fund was charged with the payment of the damages, and the municipality had no power to levy a general tax to pay them." "When," the court said, "private property is taken directly by the commonwealth for the public use, it is not necessary or usual that the commonwealth should be made subject to compulsory process for the collection of the money to be paid by way of compensation. It is sufficient if the statute which authorizes the taking of the property should provide for the assessment of the damages in the ordinary manner, and direct that the damages so assessed be paid out of the treasury of the commonwealth, and authorize the governor to draw his warrant therefor."

Much stress was placed by counsel in that case upon the admitted fact that the earnings of the railroad owned by the commonwealth would probably be sufficient to meet and extinguish all claims for damages for lands taken. But that, the court well said, fell short of the constitutional requirement that the owner of property shall have prompt and certain compensation, without being subjected to undue risk or unreasonable delay.

In the later case of *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394, 396, 8 N.E. 119, the language of the court was that "a statute which attempts to authorize the appropriation of private property for public uses, without making adequate provision for compensation, is unconstitutional and void."

In view of these authorities, it is clear that, as the constitution of Massachusetts does not require compensation to be first actually made or tendered before the rights of the public in the property taken or applied become complete, the requirements of that instrument are fully met where the statute makes such provision for reasonable compensation as will be adequate and certain in its results. It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal

mode, of the damages sustained by the owner, and gives him an unqualified right to a judgment for the amount of such damages, which can be enforced—that is, collected—by judicial process.

Substantially the same principles have been announced by this court when interpreting the clause of the Constitution of the United States that forbids the taking of private property for public use without just compensation. \* \* \* [Here are discussed *Cherokee Nation v. So. Kan. R. R.*, 135 U.S. 641, 658, 10 S.Ct. 965, 34 L.Ed. 295; *Kennedy v. Indianapolis*, 103 U.S. 599, 603, 26 L.Ed. 550; *Baltimore, etc., Co. v. Nesbit*, 10 How. 395, 398, 399, 13 L.Ed. 469; *Bloodgood v. Mohawk, etc., Co.*, 18 Wend., N.Y., 9, 17, 18, 31 Am.Dec. 313; *People v. Hayden*, 6 Hill, N.Y., 359, 361; and *Stacey v. Vt. C. R. R.*, 27 Vt. 39, 44.]

The case now before us differs from all, or nearly all, of those cited by the plaintiffs in this: that in the latter the statute under which the property was taken, either expressly or by necessary implication, made the payment or tender of the compensation awarded to the owner of the property appropriated to public use a condition precedent to the acquisition of title by the party at whose instance the property was taken; whereas, in the present case, the statute vests the title in the city of Boston from at least the time it filed in the office of the registry of deeds a description of the lands taken by it, describing them with as much certainty as is required in a common conveyance of lands, and stating that the same were taken pursuant to the provisions of the statute. As soon as they were so taken, the city, invested from that time with the title, had the right forthwith to raise the grade, and could not throw the property back upon the former owner, or compel him to pay the cost of raising the grade; and the owner became, from the moment the property was taken, absolutely entitled to reasonable compensation, the amount to be ascertained without undue delay, in the mode prescribed, and its payment to be assured, if necessary, by decree against the city, which could be effectively enforced.

We are of opinion that, upon both principle and authority, it was competent for the legislature, in the exercise of the police powers of the commonwealth, and of its power to appropriate private property for public uses, to authorize the city to take the fee in the lands described in the statute, prior to making compensation, and that the provision made for compensating the owner was certain and adequate. \* \* \*

Judgment affirmed.

## NOTE

1. Due process does not require the condemnation of land prior to its occupation by the condemnor, if the owner is afforded an opportunity in the course of the condemnation proceedings to be heard on the value of the land taken, *Bailey v. Anderson*, 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945). He is also entitled to a judicial determination of whether the use for which it is taken is a public use; see par. 3 of Note on p. 733.

2. See P. Blair, *Federal Condemnation Proceedings and the Seventh Amendment*, 41 Harv.L.Rev. 29 (1927); W. D. Hines, *Does the Seventh Amendment to the Constitution of the United States Require Jury Trials in All Condemnation Proceedings*, 11 Va.L.Rev. 505 (1925).

## CHAPTER 19

### PROTECTION OF CIVIL AND POLITICAL RIGHTS

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#### POLLOCK v. WILLIAMS. •

Supreme Court of the United States, 1944.  
322 U.S. 4, 64 S.Ct. 792, 88 L.Ed. 1095.

Mr. Justice JACKSON delivered the opinion of the Court.

Appellant Pollock questions the validity of a statute of the State of Florida making it a misdemeanor to induce advances with intent to defraud by a promise to perform labor and further making failure to perform labor for which money has been obtained prima facie evidence of intent to defraud. It conflicts, he says, with the Thirteenth Amendment to the Federal Constitution and with the antipeonage statute enacted by Congress thereunder. Claims also are made under the due process and equal protection clauses of the Fourteenth Amendment which we find it unnecessary to consider.

Pollock was arrested January 5, 1943, on a warrant issued three days before which charged that on the 17th of October, 1942, he did "with intent to injure and defraud under and by reason of a contract and promise to perform labor and service, procure and obtain money, to-wit: the sum of \$5.00, as advances from one J. V. O'Albora, a corporation, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Florida." He was taken before the county judge on the same day, entered a plea of guilty, and was sentenced to pay a fine of \$100 and in default to serve sixty days in the county jail. He was immediately committed.

On January 11, 1943, a writ of habeas corpus was issued by the judge of the circuit court, directed to the jail keeper, who is appellee here. Petition for the writ challenged the constitutionality of the statutes under which Pollock was confined and set forth that "at the trial aforesaid, he was not told that he was entitled to counsel, and that counsel would be provided for him if he wished, and he did not know that he had such right. Petitioner was without funds and unable to employ counsel. He further avers that he did not understand the nature of the charge against him, but understood that if he owed any money

to his prior employer and had quit his employment without paying the same, he was guilty, which facts he admitted." The Sheriff's return makes no denial of these allegations, but merely sets forth that he holds the prisoner by virtue of the commitment "based upon the judgment and conviction as set forth in the petition." The Supreme Court of Florida has said that "undenied allegations of the petition are taken as true."

The Circuit Court held the statutes under which the case was prosecuted to be unconstitutional and discharged the prisoner. The Supreme Court of Florida reversed. It read our decisions in *Bailey v. Alabama*, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191, and *Taylor v. Georgia*, 315 U.S. 25, 62 S.Ct. 415, 86 L.Ed. 615, to hold that similar laws are not in conflict with the Constitution in so far as they denounce the crime, but only in declaring the prima facie evidence rule. It stated that its first impression was that the entire Florida act would fall, as did that of Georgia, but on reflection it concluded that our decisions were called forth by operation of the presumption, and did not condemn the substantive part of the statute where the presumption was not brought into play. As the prisoner had pleaded guilty, the Florida court thought the presumption had played no part in this case, and therefore remanded the prisoner to custody. An appeal to this Court was taken and probable jurisdiction noted.

Florida advances no argument that the presumption section of this statute is constitutional, nor could it plausibly do so in view of our decisions. It contends, however, (1) that we can give no consideration to the presumption section because it was not in fact brought into play in the case, by reason of the plea of guilty; (2) that so severed the section denouncing the crime is constitutional.

## I.

These issues emerge from an historical background against which the Florida legislation in question must be appraised.

The Thirteenth Amendment to the Federal Constitution, made in 1865, declares that involuntary servitude shall not exist within the United States and gives Congress power to enforce the article by appropriate legislation. Congress on March 2, 1867, enacted that all laws or usages of any state "by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise," are null and void, and denounced it as a crime to hold, arrest, or return a person to the

condition of peonage. Congress thus raised both a shield and a sword against forced labor because of debt.

Clyatt v. United States, 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726, was a case from Florida in which the Federal Act was used as a sword and an employer convicted under it. This Court sustained it as constitutional and said of peonage: "It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. \* \* \* Peonage is sometimes classified as voluntary or involuntary; but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. \* \* \* A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject, like any other contractor, to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service."

Then came the twice-considered case of Bailey v. Alabama, in which the Act and the Constitution were raised as a shield against conviction of a laborer under an Alabama act substantially the same as the one before us now. Bailey, a Negro, had obtained \$15 from a corporation on a written agreement to work for a year at \$12 per month, \$10.75 to be paid him and \$1.25 per month to apply on his debt. In about a month he quit. He was convicted, fined \$30, or in default sentenced to hard labor for 20 days in lieu of the fine and 116 days on account of costs. The Court considered that the portion of the state law defining the crime would require proof of intent to defraud, and so did not strike down that part; nor was it expressly sustained, nor was it necessarily reached, for the prima facie evidence provision had been used to obtain a conviction. This Court held the presumption, in such a context, to be unconstitutional. \* \* \*

## II.

The State contends that we must exclude the prima facie evidence provision from consideration because in fact it played no part in producing this conviction. Such was the holding of the State Supreme Court. We are not concluded by that holding, however, but under the circumstances are authorized to make an independent determination.

What the prisoner actually did that constituted the crime cannot be gleaned from the record. The charge is cast in the words of the statute and is largely a conclusion. It affords no information except that Pollock obtained \$5 from a corporation in connection with a promise to work which he failed to perform, and that his doing so was fraudulent. If the conclusion that the prisoner acted with intent to defraud rests on facts and not on the prima facie evidence provisions of the statute, none are stated in the warrant or appear in the record. None were so set forth that he could deny them. He obtained the money on the 14th of October, 1942, and the warrant was not sought until January 2, 1943. Whether the original advancement was more or less than \$5, what he represented or promised in obtaining it, whether he worked a time and quit, or whether he never began work at all are undisclosed. About all that appears is that he obtained an advancement of \$5 from a corporation and failed to keep his agreement to work it out. He admitted those facts and the law purported to supply the element of intent. He admitted the conclusion of guilt which the statute made prima facie thereon. He was fined \$20 for each dollar of his debt, and in default of payment was required to atone for it by serving time at the rate of less than 9¢ per day.

Especially in view of the undenied assertions in Pollock's petition we cannot doubt that the presumption provision had a coercive effect in producing the plea of guilty. The statute laid its undivided weight upon him. The legislature had not even included a separability clause. Of course the function of the prima facie evidence section is to make it possible to convict where proof of guilt is lacking. No one questions that we clearly have held that such a presumption is prohibited by the Constitution and the federal statute. The Florida Legislature has enacted and twice re-enacted it since we so held. We cannot assume it was doing an idle thing. Since the presumption was known to be unconstitutional and of no use in a contested case, the only explanation we can find for its persistent appearance in the statute is its extra-legal coercive effect in suppressing defenses. It confronted this defendant. There was every probability that a law so recently and repeatedly enacted by the legislature would be followed by the trial court, whose judge was not required to be a lawyer. The possibility of obtaining relief by appeal was not bright, as the event proved, for Pollock had to come all the way to this Court and was required, and quite regularly, to post a supersedeas bond of \$500, a hundred times the amount of his debt. He was an illiterate Negro laborer in the toils of the law for the want of \$5. Such considerations

bear importantly on the decision of a prisoner even if aided by counsel, as Pollock was not, whether to plead guilty and hope for leniency or to fight. It is plain that, had his plight after conviction not aroused outside help, Pollock himself would have been unheard in any appellate court.

In the light of its history, there is no reason to believe that the law was generally used or especially useful merely to punish deceit. Florida has a general and comprehensive statute making it a crime to obtain money or property by false pretenses or commit "gross fraud or cheat at common law." These appear to authorize prosecution for even the petty amount involved here. We can conceive reasons, even if unconstitutional ones, which might lead well-intentioned persons to apply this Act as a means to make otherwise shiftless men work, but if in addition to this general fraud protection employers as a class are so susceptible to imposition that they need extra legislation, or workmen so crafty and subtle as to constitute a special menace, we do not know it, nor are we advised of such facts.

We think that a state which maintains such a law in fact of the court decisions we have recited may not be heard to say that a plea of guilty under the circumstances is not due to pressure of its statutory threat to convict him on the presumption.

\* \* \*

### III.

We are induced by the evident misunderstanding of our decisions by the Florida Supreme Court, in what we are convinced was a conscientious and painstaking study of them, to make more explicit the basis of constitutional invalidity of this type of statute.

The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. Forced labor in some special circumstances may be consistent with the general basic system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways which society may compel. But in general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but

every other with whom his labor comes in competition. Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service. This congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor. The federal statutory test is a practical inquiry into the utilization of an act as well as its mere form and terms.

Where peonage has existed in the United States it has done so chiefly by virtue of laws like the statute in question. Whether the statute did or did not include the presumption seems to have made little difference in its practical effect. In 1910, in response to a resolution of the House of Representatives, the Immigration Commission reported the results of an investigation of peonage among immigrants in the United States. It found that no general system of peonage existed, and that sentiment did not support it anywhere. On the other hand, it found sporadic cases of probable peonage in every state in the Union except Oklahoma and Connecticut. It pointed out that "there has probably existed in Maine the most complete system of peonage in the entire country," in the lumber camps. In 1907, Maine enacted a statute, applicable only to lumber operations but in its terms very like the section of the Florida statute we are asked to separate and save. The law was enforceable in local courts not of record. The Commission pointed out that the Maine statute, unlike that of Minnesota and the statutes of other states in the West and South, did not contain a *prima facie* evidence provision. But as a practical matter the statute led to the same result.

The fraud which such statutes purport to penalize is not the concealment or misrepresentation of existing facts, such as financial condition, ownership of assets, or data relevant to credit. They either penalize promissory representations which relate to future action and conduct or they penalize a misrepresentation of the present intent or state of mind of the laborer. In these "a hair perhaps divides the false and true." Of course there might be provable fraud even in such matters. One might engage for the same period to several employers, collecting an advance from each, or he might work the same trick of hiring out and collecting in advance again and again, or otherwise provide proof that fraud was his design and purpose. But in not one of the cases to come before this Court under the antipeonage statute has there been evidence of such subtlety or design. In each there

was the same story, a necessitous and illiterate laborer, an agreement to work for a small wage, a trifling advance, a breach of contract to work. In not one has there been proof from which we fairly could say whether the Negro never intended to work out the advance, or quit because of some real or fancied grievance, or just got tired. If such statutes have ever on even one occasion been put to a worthier use in the records of any state court, it has not been called to our attention. If this is the visible record, it is hardly to be assumed that the off-the-record uses are more benign.

It is a mistake to believe that in dealing with statutes of this type we have held the presumption section to be the only source of invalidity. On the contrary, the substantive section has contributed largely to the conclusion of unconstitutionality of the presumption section. The latter in a different context might not be invalid. Indeed, we have sustained the power of the state to enact an almost identical presumption of fraud, but in transactions that did not involve involuntary labor to discharge a debt. *James-Dickinson Farm Mortgage Co. v. Harry*. Absent this feature any objection to prima facie evidence or presumption statutes of the state can arise only under the Fourteenth Amendment, rather than under the Thirteenth. In deciding peonage cases under the latter this Court has been as careful to point out the broad power of the state to create presumptions as it has to point out its power to punish frauds. It "has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. \* \* \* In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be prima facie evidence of the main fact in issue; and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law." *Bailey v. Alabama*. But the Court added that "the state may not in this way interfere with matters withdrawn from its authority by the Federal Constitution, or subject an accused to conviction for conduct which it is powerless to proscribe." And it proceeded to hold that the presumption, when coupled with the other section, transgressed those limits, for while it appeared to punish fraud the inevitable effect of the law was to punish failure to perform labor contracts.

In *Taylor v. Georgia* both sections of the Act were held unconstitutional. There the State relied on the presumption to convict.

But it was not denied that a state has power reasonably to prescribe the prima facie inferences to be drawn from circumstantial evidence. It was the substance of the crime to establish which the presumption was invoked that gave a forbidden aspect to that method of short-cutting the road to conviction. The decision striking down both sections was not, as the Supreme Court of Florida thought, a casual and unconsidered use of the plural. Mr. Justice Byrnes knew whereof he spoke; unconstitutionality inhered in the substantive quite as much as in the procedural section and no part of the invalid statute could be separated to be salvaged. Where in the same substantive context the State threatens by statute to convict on a presumption, its inherent coercive power is such that we are constrained to hold that it is equally useful in attempts to enforce involuntary service in discharge of a debt, and the whole is invalid.

It is true that in each opinion dealing with statutes of this type this Court has expressly recognized the right of the state to punish fraud, even in matters of this kind, by statutes which do not either in form or in operation lend themselves to sheltering the practice of peonage. Deceit is not put beyond the power of the state because the cheat is a laborer nor because the device for swindling is an agreement to labor. But when the state undertakes to deal with this specialized form of fraud, it must respect the constitutional and statutory command that it may not make failure to labor in discharge of a debt any part of a crime. It may not directly or indirectly command involuntary servitude, even if it was voluntarily contracted for.

From what we have said about the practical considerations which are relevant to the inquiry whether any particular state act conflicts with the Antipeonage Act of 1867 because it is one by which "any attempt shall hereafter be made to establish, maintain, or enforce" the prohibited servitude, it is apparent that we should not pass on hypothetical acts. Reservation of the question of the validity of an act unassociated with a presumption now, as heretofore, does not denote approval. The Supreme Court of Florida has held such an act standing alone unconstitutional. A considerable recorded experience would merit examination in relation to any specific labor fraud act. We do not enter upon the inquiry further than the Act before us.

Another matter deserves notice. In *Bailey v. Alabama* it was observed that the law of that state did not permit the prisoner to testify to his uncommunicated intent, which handicapped him in meeting the presumption. In *Taylor v. Georgia* the prisoner could not be sworn, but could and did make a statement to the

jury. In this Florida case appellee is under neither disability, but is at liberty to offer his sworn word as against presumptions. These distinctions we think are without consequence. As Mr. Justice Byrnes said in *Taylor v. Georgia*, the effect of this disability "was simply to accentuate the harshness of an otherwise invalid statute."

We impute to the Legislature no intention to oppress, but we are compelled to hold that the Florida Act of 1919 as brought forward on the statutes as §§ 817.09 and 817.10 of the Statutes of 1941, F.S.A. are, by virtue of the Thirteenth Amendment and the Antipeonage Act of the United States, null and void. The judgment of the court below is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice REED dissented in an opinion joined in by Chief Justice STONE.

#### NOTE

1. Historical considerations have been the basis for holding valid certain laws which result in forcing one to work against one's will. It is on that basis that a federal statute has been held not to violate the Thirteenth Amendment although it punished seamen deserting their vessel, *Robertson v. Baldwin*, 165 U.S. 275, 17 S.Ct. 326, 41 L.Ed. 715 (1897); that compulsory military service has been held not to violate it, *Selective Draft Law Cases*, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349 (1918); and that a state law requiring several days' labor upon public highways has been held not to violate it, *Butler v. Perry*, 240 U.S. 328, 36 S.Ct. 258, 60 L.Ed. 672 (1916).

2. During World War I several states enacted laws requiring all male persons between certain ages to be engaged, or to work regularly, in some useful calling or occupation, under penalty of punishment, regardless of such person's ability to support himself and his dependents without labor. Such laws were held to violate the Thirteenth Amendment in some cases, *Ex parte Hudgins*, 86 W. Va. 526, 103 S.E. 327 (1920); and sustained in others, *State v. McClure*, 30 Del. 265, 105 A. 712 (1919). *W. F. Keefer, Has a Person a Constitutional Right to Abstain from Work?*, 29 W.Va.L.Quar.R. 20 (1922).

3. See as to the extent to which the Amendment limits courts of equity in decreeing performance of contracts of personal service, *In re Lennon*, 166 U.S. 548, 17 S.Ct. 658, 41 L.Ed. 1110 (1897); *R. S. Stevens, Involuntary Servitude by Injunction*, 6 Cornell L.Quar. 235 (1921).

## PIERCE v. SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY.

Supreme Court of the United States, 1925. 268 U.S. 510, 45 S.Ct. 571,  
69 L.Ed. 1070, 39 A.L.R. 468.

[Appeals from the District Court of the United States for the District of Oregon. Two suits, one by the Society of the Sisters of the Holy Names of Jesus and Mary, the other by the Hill Military Academy, both against Pierce, as Governor of Oregon, and others, to enjoin the enforcement of the Oregon Compulsory Education Act of Nov. 7, 1922, Laws Or.1923, p. 9. From decrees for plaintiffs, denying motions to dismiss and granting a preliminary injunction, defendants appeal. Affirmed.]

Mr. Justice McREYNOLDS. These appeals are from decrees, based upon undenied allegations, which granted preliminary orders restraining appellants from threatening or attempting to enforce the Compulsory Education Act adopted November 7, 1922 (Laws Or.1923, p. 9), under the initiative provision of her Constitution by the voters of Oregon. Judicial Code, § 266, 28 U.S.C. A. § 380. They present the same points of law; there are no controverted questions of fact. Rights said to be guaranteed by the federal Constitution were specially set up, and appropriate prayers asked for their protection.

The challenged act, effective September 1, 1926, requires every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him "to a public school for the period of time a public school shall be held during the current year" in the district where the child resides; and failure so to do is declared a misdemeanor. There are exemptions—not specially important here—for children who are not normal, or who have completed the eighth grade, or whose parents or private teachers reside at considerable distances from any public school, or who hold special permits from the county superintendent. The manifest purpose is to compel general attendance at public schools by normal children, between 8 and 16, who have not completed the eighth grade. And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property. \* \* \*

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies

plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

The inevitable practical result of enforcing the act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the state of Oregon. Appellees are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students, or the state. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1146, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment, U.S.C.A.Const. amend. 14, guarantees. Accepted in the proper sense, this is true. *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243, 255, 27 S.Ct. 126, 51 L.Ed. 168, 7 Ann.Cas. 1104; *Western Turf Association v. Greenberg*, 204 U.S. 359, 363, 27 S.Ct. 384, 51 L.Ed. 520. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 543, Ann.Cas.1917B, 283; *Truax v. Corrigan*, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375; *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255.

The courts of the state have not construed the act, and we must determine its meaning for ourselves. Evidently it was expected

to have general application and cannot be construed as though merely intended to amend the charters of certain private corporations, as in *Berea College v. Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81. No argument in favor of such view has been advanced.

Generally, it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the state upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any proper power. Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in *Truax v. Raich*, *Truax v. Corrigan*, and *Terrace v. Thompson*, supra, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 38 S.Ct. 65, 62 L.Ed. 260, L.R.A.1918C, 497, Ann.Cas.1918B, 461; *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 41 S.Ct. 172, 65 L.Ed. 349, 16 A.L.R. 196; *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 42 S.Ct. 72, 66 L.Ed. 189, 27 A.L.R. 360; *Nebraska District, etc., v. McKelvie*, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047; *Truax v. Corrigan*, supra, and cases there cited. \* \* \*

#### NOTE

1. A state statute forbidding the teaching in any school of any subject in any language except English, and prohibiting the teaching of any foreign language until the pupil had passed beyond the eighth grade, was held an unconstitutional interference with freedom of teaching and with the rights of parents, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

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#### STATE OF MISSOURI ex rel. GAINES v. CANADA.

Supreme Court of the United States, 1938.  
305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

Petitioner Lloyd Gaines, a negro, was refused admission to the School of Law of the State University of Missouri. Asserting that this refusal constituted a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution, U.S.C.A.Const. Amend. 14, petitioner

brought this action for mandamus to compel the curators of the University to admit him. On final hearing, an alternative writ was quashed and a peremptory writ was denied by the Circuit Court. The Supreme Court of the State affirmed the judgment. 113 S.W.2d 783. We granted certiorari. 305 U.S. 580, 59 S.Ct. 65, 83 L.Ed. 365.

Petitioner is a citizen of Missouri. In August, 1935, he was graduated with the degree of Bachelor of Arts at the Lincoln University, an institution maintained by the State of Missouri for the higher education of negroes. That University has no law school. Upon the filing of his application for admission to the law school of the University of Missouri, the registrar advised him to communicate with the president of Lincoln University and the latter directed petitioner's attention to Section 9622 of the Revised Statutes of Missouri (1929), Mo.St. Ann. § 9622, p. 7328, providing as follows:

"§ 9622. *May arrange for attendance at university of any adjacent state—tuition fees.* Pending the full development of the Lincoln university, the board of curators shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the state university of Missouri, and which are not taught at the Lincoln university and to pay the reasonable tuition fees for such attendance; *provided* that whenever the board of curators deem it advisable they shall have the power to open any necessary school or department. (Laws 1921, p. 86, § 7.)"

Petitioner was advised to apply to the State Superintendent of Schools for aid under that statute. It was admitted on the trial that petitioner's "work and credits at the Lincoln University would qualify him for admission to the School of Law of the University of Missouri if he were found otherwise eligible". He was refused admission upon the ground that it was "contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri". It appears that there are schools of law in connection with the state universities of four adjacent States, Kansas, Nebraska, Iowa and Illinois, where non-resident negroes are admitted.

The clear and definite conclusions of the state court in construing the pertinent state legislation narrow the issue. The action of the curators, who are representatives of the State in the management of the state university (R.S.Mo. Sec. 9625, Mo.St. Ann. § 9625, p. 7330), must be regarded as state action. The state constitution provides that separate free public schools shall

be established for the education of children of African descent (Art. 11, Sec. 3), Mo.St.Ann. Const. art. 11, § 3, and by statute separate high school facilities are supplied for colored students equal to those provided for white students (R.S.Mo. Secs. 9346-9349, Mo.St.Ann. §§ 9346-9349, pp. 7183-7187). While there is no express constitutional provision requiring that the white and negro races be separated for the purpose of higher education, the state court on a comprehensive review of the state statutes held that it was intended to separate the white and negro races for that purpose also. Referring in particular to Lincoln University, the court deemed it to be clear "that the Legislature intended to bring the Lincoln University up to the standard of the University of Missouri, and give to the whites and negroes an equal opportunity for higher education—the whites at the University of Missouri, and the negroes at Lincoln University". 113 S.W.2d 787. Further, the court concluded that the provisions of Section 9622 (above quoted) to the effect that negro residents "may attend the university of any adjacent State with their tuition paid, pending the full development of Lincoln University", made it evident "that the Legislature did not intend that negroes and whites should attend the same university in this State". In that view it necessarily followed that the curators of the University of Missouri acted in accordance with the policy of the State in denying petitioner admission to its School of Law upon the sole ground of his race.

In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the state court has fully recognized the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions. *Plessy v. Ferguson*, 163 U.S. 537, 544, 16 S.Ct. 1138, 1140, 41 L.Ed. 256; *McCabe v. Atchison, Topeka & Santa Fe Rwy. Co.*, 235 U.S. 151, 160, 35 S.Ct. 69, 70, 59 L.Ed. 169; *Gong Lum v. Rice*, 275 U.S. 78, 85, 86, 48 S.Ct. 91, 93, 72 L.Ed. 172. Compare *Cumming v. Board of Education*, 175 U.S. 528, 544, 545, 20 S.Ct. 197, 200, 44 L.Ed. 262. Respondents' counsel have appropriately emphasized the special solicitude of the State for the higher education of negroes as shown in the establishment of Lincoln University, a state institution well conducted on a plane with the University of Missouri so far as the offered courses are concerned. It is said that Missouri is a pioneer in that field and is the only State in the Union which has established

a separate university for negroes on the same basis as the state university for white students. But, commendable as is that action, the fact remains that instruction in law for negroes is not now afforded by the State, either at Lincoln University or elsewhere within the State, and that the State excludes negroes from the advantages of the law school it has established at the University of Missouri.

It is manifest that this discrimination, if not relieved by the provisions we shall presently discuss, would constitute a denial of equal protection. \* \* \*

The Supreme Court of Missouri in the instant case has distinguished the decision in Maryland upon the grounds—(1) that in Missouri, but not in Maryland, there is “a legislative declaration of a purpose to establish a law school for negroes at Lincoln University whenever necessary or practical”; and (2) that, “pending the establishment of such a school, adequate provision has been made for the legal education of negro students in recognized schools outside of this State”. 113 S.W.2d page 791.

As to the first ground, it appears that the policy of establishing a law school at Lincoln University has not yet ripened into an actual establishment, and it cannot be said that a mere declaration of purpose, still unfulfilled, is enough. The provision for legal education at Lincoln is at present entirely lacking. Respondents' counsel urge that if, on the date when petitioner applied for admission to the University of Missouri, he had instead applied to the curators of Lincoln University it would have been their duty to establish a law school; that this “agency of the State,” to which he should have applied, was “specifically charged with the mandatory duty to furnish him what he seeks”. We do not read the opinion of the Supreme Court as construing the state statute to impose such a “mandatory duty” as the argument seems to assert. The state court quoted the language of Section 9618, R.S.Mo.1929, Mo.St.Ann. § 9618, p. 7327, set forth in the margin, making it the mandatory duty of the board of curators to establish a law school in Lincoln University “whenever necessary and practicable in their opinion”. This qualification of their duty, explicitly stated in the statute, manifestly leaves it to the judgment of the curators to decide when it will be necessary and practicable to establish a law school, and the state court so construed the statute. Emphasizing the discretion of the curators, the court said:

“The statute was enacted in 1921. Since its enactment no negro, not even appellant, has applied to Lincoln University for a law education. This fact demonstrates the wisdom of the Legislature in leaving it to the judgment of the board of curators to

determine when it would be necessary or practicable to establish a law school for negroes at Lincoln University. Pending that time, adequate provision is made for the legal education of negroes in the university of some adjacent State, as heretofore pointed out". 113 S.W.2d page 791.

The state court has not held that it would have been the duty of the curators to establish a law school at Lincoln University for the petitioner on his application. Their duty, as the court defined it, would have been either to supply a law school at Lincoln University as provided in Section 9618 or to furnish him the opportunity to obtain his legal training in another State as provided in Section 9622. Thus the law left the curators free to adopt the latter course. The state court has not ruled or intimated that their failure or refusal to establish a law school for a very few students, still less for one student, would have been an abuse of the discretion with which the curators were entrusted. And, apparently, it was because of that discretion, and of the postponement which its exercise in accordance with the terms of the statute would entail until necessity and practicability appeared, that the state court considered and upheld as adequate the provision for the legal education of negroes, who were citizens of Missouri, in the universities of adjacent States. We may put on one side respondents' contention that there were funds available at Lincoln University for the creation of a law department and the suggestions with respect to the number of instructors who would be needed for that purpose and the cost of supplying them. The president of Lincoln University did not advert to the existence or prospective use of funds for that purpose when he advised petitioner to apply to the State Superintendent of Schools for aid under Section 9622. At best, the evidence to which argument as to available funds is addressed admits of conflicting inferences, and the decision of the state court did not hinge on any such matter. In the light of its ruling we must regard the question whether the provision for the legal education in other States of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection, as the pivot upon which this case turns.

The state court stresses the advantages that are afforded by the law schools of the adjacent States, Kansas, Nebraska, Iowa and Illinois, which admit non-resident negroes. The court considered that these were schools of high standing where one desiring to practice law in Missouri can get "as sound, comprehensive, valuable legal education" as in the University of Missouri; that the system of education in the former is the same as that in the latter and is designed to give the students a basis for the

practice of law in any State where the Anglo-American system of law obtains; that the law school of the University of Missouri does not specialize in Missouri law and that the course of study and the case books used in the five schools are substantially identical. Petitioner insists that for one intending to practice in Missouri there are special advantages in attending a law school there, both in relation to the opportunities for the particular study of Missouri law and for the observation of the local courts, and also in view of the prestige of the Missouri law school among the citizens of the State, his prospective clients. Proceeding with its examination of relative advantages, the state court found that the difference in distances to be traveled afforded no substantial ground of complaint and that there was an adequate appropriation to meet the full tuition fees which petitioner would have to pay.

We think that these matters are beside the point. The basic consideration is not as to what sort of opportunities, other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

The equal protection of the laws is "a pledge of the protection of equal laws". *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220. Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders.

It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system. It seems to be implicit in respondents' argument that if other States did not provide courses for legal education, it would nevertheless be the constitutional duty of Missouri when it supplied such courses for white students to make equivalent provision for negroes. But that plain duty would exist because it rested upon the State independently of the action of other States. We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination but cannot serve to validate it.

Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of negroes as excusing the discrimination in favor of whites. \* \* \*

Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.

It is urged, however, that the provision for tuition outside the State is a temporary one,—that it is intended to operate merely pending the establishment of a law department for negroes at Lincoln University. While in that sense the discrimination may be termed temporary, it may nevertheless continue for an indefinite period by reason of the discretion given to the curators of Lincoln University and the alternative of arranging for tuition in other States, as permitted by the state law as construed by the state court, so long as the curators find it unnecessary and impracticable to provide facilities for the legal instruction of negroes within the State. In that view, we cannot regard the discrimination as excused by what is called its temporary character. \* \* \*

The judgment of the Supreme Court of Missouri is reversed and the cause is remanded for further proceedings not inconsistent with this opinion. It is so ordered.

Reversed and remanded.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER dissented.

## NOTE

1. The doctrine of the reported case was reaffirmed in *Sipuel v. Board of Regents of University of Oklahoma*, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. — (1948), in which the Court said: "The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group." See *Fisher v. Hurst*, 333 U.S. 147, 68 S.Ct. 389, 92 L.Ed. — (1948), for discussion of whether the state court's decree intended to carry into effect the Supreme Court's mandate in the *Sipuel* Case was adequate. On other aspects of racial discriminations, see A. T. Martin, *Segregating Residences of Negroes*, 32 Mich.L.Rev. 721 (1934); Edward F. Waite, *The Negro in the Supreme Court*, 30 Minn.L.Rev. 219 (1946).

2. Thus far the Supreme Court has never yet held that the equal protection clause prohibits racial segregation in public school systems. A lower federal court has so held, *Mendez v. Westminster School District, etc.*, 64 F.Supp. 544 (D.C.Cal.1946), affirmed 161 F.2d 774 (1947). That clause does require the state to provide substantially equal opportunities for the education of members of the different races, *Gong Lum v. Rice*, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172 (1927). As to what constitutes equality of opportunity, see *Cumming v. Board of Education of Richmond County*, 175 U.S. 528, 20 S.Ct. 197, 44 L.Ed. 262 (1899).

3. That the equal protection clause also prohibits discrimination on the basis of color in fixing salaries of public school teachers, see *Alston v. School Board of Norfolk*, 112 F.2d 992 (C.C.A.Va. 1940); *Morris v. Williams*, 149 F.2d 703 (C.C.A.Ark.1945).

4. The due process clause of the Fourteenth Amendment is not violated by denying readmission to a student who has been suspended by a state university for refusing to comply with a regulation making military drill compulsory, *Hamilton v. Regents of the University of California*, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343 (1934).

5. A state may exclude children from its schools who fail to present a certificate of vaccination, *Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 174 (1922). For case sustaining compulsory vaccination law, see *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905). See R. A. Brown, *Police Power — Legislation for Health and Personal Safety*, 42 Harv.L.Rev. 866 (1929). The analogy of compulsory vaccination laws was relied upon to sustain, against both due process and equal protection objections, a statute for the compulsory sterilization of mental defectives who were inmates of state institutions, *Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927); but such a statute whose scope was limited to habitual criminals was held to violate the equal protection clause in *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). See J. B. Aronoff, *the Constitutionality of Asexualization Legislation in the United States*, 1 St.Johns.L.Rev. 146 (1927).

## UNITED PUBLIC WORKERS OF AMERICA v. MITCHELL.

Supreme Court of the United States, 1947.  
330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754.

Mr. Justice REED delivered the opinion of the Court.

The Hatch Act, enacted in 1940, declares unlawful certain specified political activities of federal employees. Section 9 forbids officers and employees in the executive branch of the Federal Government, with exceptions, from taking "any active part in political management or in political campaigns." Section 15 declares that the activities theretofore determined by the United States Civil Service Commission to be prohibited to employees in the classified civil service of the United States by the civil service rules shall be deemed to be prohibited to federal employees covered by the Hatch Act. These sections of the Act cover all federal officers and employees whether in the classified civil service or not and a penalty of dismissal from employment is imposed for violation. There is no designation of a single governmental agency for its enforcement.

For many years before the Hatch Act the Congress had authorized the exclusion of federal employees in the competitive classified service from active participation in political management and political campaigns. In June, 1938, the Congressional authorization for exclusion had been made more effective by a Civil Service Commission disciplinary rule. That power to discipline members of the competitive classified civil service continues in the Commission under the Hatch Act by virtue of the present applicability of the Executive Order No. 8705, March 5, 1941. The applicable Civil Service Commission rules are printed in the margin. The only change in the Civil Service Rules relating to political activity, caused by the Hatch Act legislation, that is of significance in this case is the elimination on March 5, 1941, of the word "privately" from the phrase "to express privately their opinions." This limitation to private expression had regulated classified personnel since 1907.

The present appellants sought an injunction before a statutory three judge district court of the District of Columbia against appellees, members of the United States Civil Service Commission to prohibit them from enforcing against petitioners the provisions of the second sentence of § 9(a) of the Hatch Act for the reason that the sentence is repugnant to the Constitution of the United States. A declaratory judgment of the unconstitutionality of the sentence was also sought. The sentence referred to

reads, "No officer or employee in the executive branch of the Federal Government \* \* \* shall take any active part in political management or in political campaigns." \* \* \*

None of the appellants, except George P. Poole, has violated the provisions of the Hatch Act. They wish to act contrary to its provisions and those of § 1 of the Civil Service Rules and desire a declaration of the legally permissible limits of regulation. Defendants moved to dismiss the complaint for lack of a justiciable case or controversy. The District Court determined that each of these individual appellants had an interest in their claimed privilege of engaging in political activities, sufficient to give them a right to maintain this suit. *United Federal Workers of America (C.I.O.) v. Mitchell*, D.C., 56 F.Supp. 621, 624. The District Court further determined that the questioned provision of the Hatch Act was valid and that the complaint therefore failed to state a cause of action. It accordingly dismissed the complaint and granted summary judgment to defendants.  
\* \* \*

*Third.* The appellant Poole does present by the complaint and affidavit matters appropriate for judicial determination. The affidavits filed by appellees confirm that Poole has been charged by the Commission with political activity and a proposed order for his removal from his position adopted subject to his right under Commission procedure to reply to the charges and to present further evidence in refutation. We proceed to consider the controversy over constitutional power at issue between Poole and the Commission as defined by the charge and preliminary finding upon one side and the admissions of Poole's affidavit upon the other. Our determination is limited to those facts. This proceeding so limited meets the requirements of defined rights and a definite threat to interfere with a possessor of the menaced rights by a penalty for an act done in violation of the claimed restraint. \* \* \*

*Fourth.* This brings us to consider the narrow but important point involved in Poole's situation. Poole's stated offense is taking an "active part in political management or in political campaigns." He was a ward executive committee man of a political party and was politically active on election day as a worker at the polls and a paymaster for the services of other party workers. The issue for decision and the only one we decide is whether such a breach of the Hatch Act and Rule 1 of the Commission can, without violating the Constitution, be made the basis for disciplinary action.

When the issue is thus narrowed, the interference with free expression is seen in better proportion as compared with the requirements of orderly management of administrative personnel. Only while the employee is politically active, in the sense of Rule 1, must he withhold expression of opinion on public subjects. We assume that Mr. Poole would be expected to comment publicly as committeeman on political matters, so that indirectly there is an attenuated interference. We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments are involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. And, if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment. Appellants' objections under the Amendments are basically the same.

We do not find persuasion in appellants' argument that such activities during free time are not subject to regulation even though admittedly political activities cannot be indulged in during working hours. The influence of political activity by government employees, if evil in its effects on the service, the employees or people dealing with them, is hardly less so because that activity takes place after hours. Of course, the question of the need for this regulation is for other branches of government rather than the courts. Our duty in this case ends if the Hatch Act provision under examination is constitutional.

Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolutes. The requirements of residence and age must be met. The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery. The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. Again this Court must balance the extent of the guarantees of

freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government.

As pointed out hereinbefore in this opinion, the practice of excluding classified employees from party offices and personal political activity at the polls has been in effect for several decades. Some incidents similar to those that are under examination here have been before this Court and the prohibition against certain types of political activity by office holders has been upheld. The leading case was decided in 1882. *Ex parte Curtis*, 106 U.S. 371, 1 S.Ct. 381, 27 L.Ed. 232. There a subordinate United States employee was indicted for violation of an act that forbade employees who were not appointed by the President and confirmed by the Senate from giving or receiving money for political purposes from or to other employees of the government on penalty of discharge and criminal punishment. *Curtis* urged that the statute was constitutional. This Court upheld the right of Congress to punish the infraction of this law. The decisive principle was the power of Congress, within reasonable limits, to regulate, so far as it might deem necessary, the political conduct of its employees. A list of prohibitions against acts by public officials that are permitted to other citizens was given. This Court said, 106 U.S. at page 373, 1 S.Ct. at page 384, 27 L.Ed. 232:

"The evident purpose of congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end."

The right to contribute money through fellow employees to advance the contributor's political theories was held not to be protected by any Constitutional provision. It was held subject to regulation. A dissent by Mr. Justice Bradley emphasized the broad basis of the Court's opinion. He contended that a citizen's right to promote his political views could not be so restricted merely because he was an official of government.

No other member of the Court joined in this dissent. The conclusion of the Court, that there was no constitutional bar to regulation of such financial contributions of public servants as distinguished from the exercise of political privileges such as the ballot, has found acceptance in the subsequent practice of Congress and the growth of the principle of required political

neutrality for classified public servants as a sound element for efficiency. The conviction that an actively partisan governmental personnel threatens good administration has deepened since *Ex parte Curtis*. Congress recognizes danger to the service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections.

In *United States v. Wurzbach*, 280 U.S. 396, 50 S.Ct. 167, 168, 74 L.Ed. 508, the doctrine of legislative power over actions of governmental officials was held valid when extended to members of Congress. The members of Congress were prohibited from receiving contributions for "any political purpose whatever" from any other federal employees. Private citizens were not affected. The argument of unconstitutionality because of interference with the political rights of a citizen by that time was dismissed in a sentence. Compare *United States v. Thayer*, 209 U.S. 39, 28 S.Ct. 426, 52 L.Ed. 673.

The provisions of § 9 of the Hatch Act and the Civil Service Rule 1 are not dissimilar in purpose from the statutes against political contributions of money. The prohibitions now under discussion are directed at political contributions of energy by Government employees. These contributions, too, have a long background of disapproval. Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection.

Another Congress may determine that on the whole, limitations on active political management by federal personnel are unwise. The teaching of experience has evidently led Congress to enact the Hatch Act provisions. To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system. Congress is not politically naive or regardless of public welfare or that of the employees. It leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests, as before the passage of the act.

The argument that political neutrality is not indispensable to a merit system for federal employees may be accepted. But because it is not indispensable does not mean that it is not de-

sirable or permissible. Modern American politics involves organized political parties. Many classifications of Government employees have been accustomed to work in politics—national, state and local—as a matter of principle or to assure their tenure. Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system. It may have considered that parties would be more truly devoted to the public welfare if public servants were not overactive politically.

Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not “enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.” None would deny such limitations on Congressional power but because there are some limitations it does not follow that a prohibition against acting as ward leader or worker at the polls is invalid. A reading of the Act and Rule 1, notes 2 and 6, *supra*, together with the Commission’s determination shows the wide range of public activities with which there is no interference by the legislation. It is only partisan political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the Government employee does not direct his activities toward party success.

It is urged, however, that Congress has gone further than necessary in prohibiting political activity to all types of classified employees. It is pointed out by appellants “that the impartiality of many of these is a matter of complete indifference to the effective performance” of their duties. Mr. Poole would appear to be a good illustration for appellants’ argument. The complaint states that he is a roller in the Mint. We take it this is a job calling for the qualities of a skilled mechanic and that it does not involve contact with the public. Nevertheless, if in free time he is engaged in political activity, Congress may have concluded that the activity may promote or retard his advancement or preferment with his superiors. Congress may have thought that Government employees are handy elements for leaders in political policy to use in building a political machine. For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service. There are hundreds of thousands of United States employees with

positions no more influential upon policy determination than that of Mr. Poole. Evidently what Congress feared was the cumulative effect on employee morale of political activity by all employees who could be induced to participate actively. It does not seem to us an unconstitutional basis for legislation.

There is a suggestion that administrative workers may be barred, constitutionally, from political management and political campaigns while the industrial workers may not be barred, constitutionally, without an act "narrowly drawn to define and punish specific conduct." A ready answer, it seems to us, lies in the fact that the prohibition of § 9(a) of the Hatch Act "applies without discrimination to all employees whether industrial or administrative" and that the Civil Service Rules, by § 15 made a part of the Hatch Act, makes clear that industrial workers are covered in the prohibition against political activity. Congress has determined that the presence of government employees, whether industrial or administrative, in the ranks of political party workers is bad. Whatever differences there may be between administrative employees of the Government and industrial workers in its employ are differences in detail so far as the constitutional power under review is concerned. Whether there are such differences and what weight to attach to them, are all matters of detail for Congress. We do not know whether the number of federal employees will expand or contract; whether the need for regulation of their political activities will increase or diminish. The use of the constitutional power of regulation is for Congress, not for the courts.

We have said that Congress may regulate the political conduct of Government employees "within reasonable limits," even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such interference passes beyond the general existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions. The regulation of such activities as Poole carried on has the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these

Section 15 of the Hatch Act, note 3 above, defines an active part in political management or political campaigns as the same activities that the United States Civil Service Commission has determined to be prohibited to classified civil service employees by the provisions of the Civil Service rules when § 15 took effect July 19, 1940. 54 Stat. 767. The activities of Mr. Poole, as ward executive committeeman and a worker at the polls, obviously fall within the prohibitions of § 9 of the Hatch Act against taking an active part in political management and political campaigns. They are also covered by the prior determinations of the Commission. We need to examine no further at this time into the validity of the definition of political activity and § 15.

The judgment of the District Court is accordingly affirmed.  
Affirmed.

Mr. Justice FRANKFURTER concurred. Mr. Justice MURPHY and Mr. Justice JACKSON took no part in the consideration or decision of this case.

Messrs. Justices RUTLEDGE, BLACK and DOUGLAS dissented.

#### NOTE

1. See Note, Restrictions on the Civil Rights of Federal Employees, 47 Col.L.Rev. 1161 (1947).

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#### SMITH v. ALLWRIGHT.

Supreme Court of the United States, 1944.  
321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987.

Mr. Justice REED delivered the opinion of the Court.

This writ of certiorari brings here for review a claim for damages in the sum of \$5,000 on the part of petitioner, a Negro citizen of the 48th precinct of Harris County, Texas, for the refusal of respondents, election and associate election judges respectively of that precinct, to give petitioner a ballot or to permit him to cast a ballot in the primary election of July 27, 1940, for the nomination of Democratic candidates for the United States Senate and House of Representatives, and Governor and other state officers. The refusal is alleged to have been solely because of the race and color of the proposed voter.

The actions of respondents are said to violate Sections 31 and 43 of Title 8 of the United States Code, 8 U.S.C.A. §§ 31 and 43, in that petitioner was deprived of rights secured by Sections 2 and 4 of Article I and the Fourteenth, Fifteenth and Seventeenth Amendments to the United States Constitution. The suit was filed in the District Court of the United States for the Southern District of Texas, which had jurisdiction under Judicial Code Section 24, subsection 14, 28 U.S.C.A. § 41 (14).

The District Court denied the relief sought and the Circuit Court of Appeals quite properly affirmed its action on the authority of *Grove v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L. Ed. 1292, 97 A.L.R. 680. We granted the petition for certiorari to resolve a claimed inconsistency between the decision in the *Grove* case and that of *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368. 319 U.S. 738, 63 S.Ct. 1325, 87 L.Ed. 1697.

The State of Texas by its Constitution and statutes provides that every person, if certain other requirements are met which are not here in issue, qualified by residence in the district or county "shall be deemed a qualified elector." Constitution of Texas, Article VI, Section 2 Vernon's Ann.St.; Vernon's Civil Statutes (1939 ed.), Article 2955. Primary elections for United States Senators, Congressmen and state officers are provided for by Chapters Twelve and Thirteen of the statutes. Under these chapters, the Democratic Party was required to hold the primary which was the occasion of the alleged wrong to petitioner. \* \* \* These nominations are to be made by the qualified voters of the party. Art. 3101.

The Democratic Party of Texas is held by the Supreme Court of that state to be a "voluntary association," *Bell v. Hill*, 123 Tex. 531, 534, 74 S.W.2d 113, protected by Section 27 of the Bill of Rights, Art. 1, Constitution of Texas, from interference by the state except that:

"In the interest of fair methods and a fair expression by their members of their preferences in the selection of their nominees, the State may regulate such elections by proper laws." Page 545 of 123 Tex., page 120 of 74 S.W.2d. That court stated further:

"Since the right to organize and maintain a political party is one guaranteed by the Bill of Rights of this state, it necessarily follows that every privilege essential or reasonably appropriate to the exercise of that right is likewise guaranteed, including, of course, the privilege of determining the policies of the party and its membership. Without the privilege of determining the policy of a political association and its membership, the right

to organize such an association would be a mere mockery. We think these rights, that is, the right to determine the membership of a political party and to determine its policies, of necessity are to be exercised by the State Convention of such party, and cannot, under any circumstances, be conferred upon a state or governmental agency." Page 546 of 123 Tex., page 120 of 74 S.W.2d. Cf. *Waples v. Marrast*, 108 Tex. 5, 184 S.W. 180, L.R.A. 1917A, 253.

The Democratic party on May 24, 1932, in a State Convention adopted the following resolution, which has not since been "amended, abrogated, annulled or avoided":

"Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party and, as such, entitled to participate in its deliberations." It was by virtue of this resolution that the respondents refused to permit the petitioner to vote.

Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government. The Fourteenth Amendment forbids a state from making or enforcing any law which abridges the privileges or immunities of citizens of the United States and the Fifteenth Amendment specifically interdicts any denial or abridgement by a state of the right of citizens to vote on account of color. Respondents appeared in the District Court and the Circuit Court of Appeals and defended on the ground that the Democratic party of Texas is a voluntary organization with members banded together for the purpose of selecting individuals of the group representing the common political beliefs as candidates in the general election. As such a voluntary organization, it was claimed, the Democratic party is free to select its own membership and limit to whites participation in the party primary. Such action, the answer asserted, does not violate the Fourteenth, Fifteenth or Seventeenth Amendment as officers of government cannot be chosen at primaries and the Amendments are applicable only to general elections where governmental officers are actually elected. Primaries, it is said, are political party affairs, handled by party not governmental officers. No appearance for respondents is made in this Court. Arguments presented here by the Attorney General of Texas and the Chairman of the State Democratic Executive Committee of Texas, as amici curiae, urged substantially the same grounds as those advanced by the respondents.

The right of a Negro to vote in the Texas primary has been considered heretofore by this Court. The first case was *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759. At that time, 1924, the Texas statute, Art. 3093a, Acts 1923, 2d Called Sess., c. 32, afterwards numbered Art. 3107, Rev.Stat.1925, declared "in no event shall a Negro be eligible to participate in a Democratic party primary election \* \* \* in the State of Texas." Nixon was refused the right to vote in a Democratic primary and brought a suit for damages against the election officers under R.S. § 1979 and 2004, the present sections 43 and 31 of Title 8, U.S.C., 8 U.S.C.A. §§ 43 and 31, respectively. It was urged to this Court that the denial of the franchise to Nixon violated his Constitutional rights under the Fourteenth and Fifteenth Amendments. Without consideration of the Fifteenth, this Court held that the action of Texas in denying the ballot to Negroes by statute was in violation of the equal protection clause of the Fourteenth Amendment and reversed the dismissal of the suit.

The legislature of Texas reenacted the article but gave the State Executive Committee of a party the power to prescribe the qualifications of its members for voting or other participation. This article remains in the statutes. The State Executive Committee of the Democratic party adopted a resolution that white Democrats and none other might participate in the primaries of that party. Nixon was refused again the privilege of voting in a primary and again brought suit for damages by virtue of Section 31, Title 8 U.S.C., 18 U.S.C.A. § 31. This Court again reversed the dismissal of the suit for the reason that the Committee action was deemed to be State action and invalid as discriminatory under the Fourteenth Amendment. The test was said to be whether the Committee operated as representative of the State in the discharge of the State's authority. *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458. The question of the inherent power of a political party in Texas "without restraint by any law to determine its own membership" was left open. *Id.*, 286 U.S. 83, 84, 85, 52 S.Ct. 485.

In *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292, 97 A.L.R. 680, this Court had before it another suit for damages for the refusal in a primary of a county clerk, a Texas officer with only public functions to perform, to furnish petitioner, a Negro, an absentee ballot. The refusal was solely on the ground of race. This case differed from *Nixon v. Condon*, *supra*, in that a state convention of the Democratic party had

passed the resolution of May 24, 1932, hereinbefore quoted. It was decided that the determination by the state convention of the membership of the Democratic party made a significant change from a determination by the Executive Committee. The former was party action, voluntary in character. The latter, as had been held in the Condon case, was action by authority of the State. The managers of the primary election were therefore declared not to be state officials in such sense that their action was state action. A state convention of a party was said not to be an organ of the state. This Court went on to announce that to deny a vote in a primary was a mere refusal of party membership with which "the state need have no concern," 295 U.S. loc.cit. 55, 55 S.Ct. loc.cit. 626, while for a state to deny a vote in a general election on the ground of race or color violated the Constitution. Consequently, there was found no ground for holding that the county clerk's refusal of a ballot because of racial ineligibility for party membership denied the petitioner any right under the Fourteenth or Fifteenth Amendments.

Since *Grove v. Townsend* and prior to the present suit, no case from Texas involving primary elections has been before this Court. We did decide, however, *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368. We there held that Section 4 of Article I of the Constitution authorized Congress to regulate primary as well as general elections, 313 U.S. at pages 316, 317, 61 S.Ct. at page 1038, "where the primary is by law made an integral part of the election machinery." 313 U.S. at page 318, 61 S.Ct. at page 1039. Consequently, in the *Classic* case, we upheld the applicability to frauds in a Louisiana primary of §§ 19 and 20 of the Criminal Code, 18 U.S.C.A. §§ 51, 52. Thereby corrupt acts of election officers were subjected to Congressional sanctions because that body had power to protect rights of Federal suffrage secured by the Constitution in primary as in general elections. 313 U.S. at page 323, 61 S.Ct. at page 1041. This decision depended, too, on the determination that under the Louisiana statutes the primary was a part of the procedure for choice of Federal officials. By this decision the doubt as to whether or not such primaries were a part of "elections" subject to Federal control, which had remained unanswered since *Newberry v. United States*, 256 U.S. 232, 41 S.Ct. 469, 65 L.Ed. 913, was erased. The *Nixon* cases were decided under the equal protection clause of the Fourteenth Amendment without a determination of the status of the primary as a part of the electoral process. The exclusion of Negroes from the primaries by action of the State was held invalid under

that Amendment. The fusing by the Classic case of the primary and general elections into a single instrumentality for choice of officers has a definite bearing on the permissibility under the Constitution of excluding Negroes from primaries. This is not to say that the Classic case cuts directly into the rationale of *Grovey v. Townsend*. This latter case was not mentioned in the opinion. Classic bears upon *Grovey v. Townsend* not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process but because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state. When *Grovey v. Townsend* was written, the Court looked upon the denial of a vote in a primary as a mere refusal by a party of party membership. 295 U.S. at page 55, 55 S.Ct. at page 626, 79 L.Ed. 1292, 97 A.L.R. 680. As the Louisiana statutes for holding primaries are similar to those of Texas, our ruling in Classic as to the unitary character of the electoral process calls for a reexamination as to whether or not the exclusion of Negroes from a Texas party primary was state action.

The statutes of Texas relating to primaries and the resolution of the Democratic party of Texas extending the privileges of membership to white citizens only are the same in substance and effect today as they were when *Grovey v. Townsend* was decided by a unanimous Court. The question as to whether the exclusionary action of the party was the action of the State persists as the determinative factor. In again entering upon consideration of the inference to be drawn as to state action from a substantially similar factual situation, it should be noted that *Grovey v. Townsend* upheld exclusion of Negroes from primaries through the denial of party membership by a party convention. A few years before this Court refused approval of exclusion by the State Executive Committee of the party. A different result was reached on the theory that the Committee action was state authorized and the Convention action was unfettered by statutory control. Such a variation in the result from so slight a change in form influences us to consider anew the legal validity of the distinction which has resulted in barring Negroes from participating in the nominations of candidates of the Democratic party in Texas. Other precedents of this Court forbid the abridgement of the right to vote. \* \* \*

It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general

election, is a right secured by the Constitution. *United States v. Classic*, 313 U.S. at page 314, 61 S.Ct. at page 1037, 85 L.Ed. 1368; *Myers v. Anderson*, 238 U.S. 368, 35 S.Ct. 932, 59 L.Ed. 1349; *Ex parte Yarbrough*, 110 U.S. 651, 663 et seq., 4 S.Ct. 152, 158, 28 L.Ed. 274. By the terms of the Fifteenth Amendment that right may not be abridged by any state on account of race. Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color.

We are thus brought to an examination of the qualifications for Democratic primary electors in Texas, to determine whether state action or private action has excluded Negroes from participation. Despite Texas' decision that the exclusion is produced by private or party action, *Bell v. Hill*, *supra*, Federal courts must for themselves appraise the facts leading to that conclusion. It is only by the performance of this obligation that a final and uniform interpretation can be given to the Constitution, the "supreme Law of the Land." \* \* \* Texas requires electors in a primary to pay a poll tax. Every person who does so pay and who has the qualifications of age and residence is an acceptable voter for the primary. Art. 2955. As appears above in the summary of the statutory provisions set out in note 6, Texas requires by the law the election of the county officers of a party. These compose the county executive committee. The county chairmen so selected are members of the district executive committee and choose the chairman for the district. Precinct primary election officers are named by the county executive committee. Statutes provide for the election by the voters of precinct delegates to the county convention of a party and the selection of delegates to the district and state conventions by the county convention. The state convention selects the state executive committee. No convention may place in platform or resolution any demand for specific legislation without endorsement of such legislation by the voters in a primary. Texas thus directs the selection of all party officers.

Primary elections are conducted by the party under state statutory authority. The county executive committee selects precinct election officials and the county, district or state executive committees, respectively, canvass the returns. These party committees or the state convention certify the party's candidates to the appropriate officers for inclusion on the official ballot for the general election. No name which has not been so certified may appear upon the ballot for the general election as a candidate of a political party. No other name may be printed on

the ballot which has not been placed in nomination by qualified voters who must take oath that they did not participate in a primary for the selection of a candidate for the office for which the nomination is made.

The state courts are given exclusive original jurisdiction of contested elections and of mandamus proceedings to compel party officers to perform their statutory duties.

We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. The plan of the Texas primary follows substantially that of Louisiana, with the exception that in Louisiana the state pays the cost of the primary while Texas assesses the cost against candidates. In numerous instances, the Texas statutes fix or limit the fees to be charged. Whether paid directly by the state or through state requirements, it is state action which compels. When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment. *Guinn v. United States*, 238 U.S. 347, 362, 35 S.Ct. 926, 930, 59 L.Ed. 1340, L.R.A.1916A, 1124.

The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. *Lane v. Wilson*, 307 U.S. 268, 275, 59 S.Ct. 872, 876, 83 L.Ed. 1281.

The privilege of membership in a party may be, as this Court said in *Grove v. Townsend*, 295 U.S. 45, 55, 55 S.Ct. 622, 626, 79 L.Ed. 1292, 97 A.L.R. 680, no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state. In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself. Here we are applying, contrary to the recent decision in *Grove v. Townsend*, the well established principle of the Fifteenth Amendment, forbidding the abridgement by a state of a citizen's right to vote. *Grove v. Townsend* is overruled.

Judgment reversed.

Mr. Justice FRANKFURTER concurs in the result.

Mr. Justice ROBERTS dissented.

#### NOTE

1. The Fifteenth Amendment provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude." A state constitutional provision which denied the right to vote to those who could not read and write any section of the state's constitution but which excepted therefrom all those who on January 1, 1866, or prior thereto, had the right to vote under any form of government, or who at that time resided in a foreign nation, or who were lineal descendants of any of the foregoing excepted persons, was held to violate the Fifteenth Amendment in *Guinn v. U. S.*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), and in *Myers v. Anderson*, 238 U.S. 368, 35 S.Ct. 932, 59 L. Ed. 1349 (1915). For a case invalidating a legislative device invented after the decision in the *Guinn* Case and intended to hamper negro voting, see *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L. Ed. 1281 (1939). In *Breedlove v. Suttles*, 302 U.S. 277, 58 S.Ct. 205, 82 L.Ed. 252 (1937), the Supreme Court held a poll-tax act not to deny equal protection because limited to male citizens between certain ages. The case involved a white voter. See *L. B. Boudin, State Poll Taxes and the Federal Constitution*, 28 Va.L.Rev. 1 (1941).

2. The Nineteenth Amendment prohibits the United States and the states from denying or abridging the right to vote on account of sex. Prior thereto it had been held that denying the right to vote to women did not violate the privileges or immunities of federal citizenship, *Minor v. Happersett*, 21 Wall. 162, 22 L.Ed. 627 (1875).

3. The extent of Congressional power to protect the political rights and privileges of citizens to vote for members of the Congress, and to regulate the elections at which they are chosen, is discussed in *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717 (1880); *Ex parte Yarborough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884). Its power to protect the right to vote in primary elections for the nomination of candidates for seats in Congress is extensively considered in *U. S. v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941).

4. It has been held that the right to become a candidate for, and to be elected to, a state office are not privileges of federal citizenship but of state citizenship, and that an unlawful denial of those rights by state law is not of itself a denial of any right secured by the Fourteenth Amendment, *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944).

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### DE JONGE v. OREGON.

Supreme Court of the United States, 1937. 299 U.S. 353, 57 S.Ct. 255,  
81 L.Ed. 278.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

Appellant, Dirk De Jonge, was indicted in Multnomah County, Or., for violation of the Criminal Syndicalism Law of that State. The act, which we set forth in the margin, defines "criminal syndicalism" as "the doctrine which advocates crime, physical violence, sabotage, or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution." With this preliminary definition the act proceeds to describe a number of offenses, embracing the teaching of criminal syndicalism, the printing or distribution of books, pamphlets, etc., advocating that doctrine, the organization of a society or assemblage which advocates it, and presiding at or assisting in conducting a meeting of such an organization, society or group. The prohibited acts are made felonies, punishable by imprisonment for not less than one year nor more than ten years, or by a fine of not more than \$1,000, or by both.

We are concerned with but one of the described offenses and with the validity of the statute in this particular application. The charge is that appellant assisted in the conduct of a meeting which was called under the auspices of the Communist Party, an organization advocating criminal syndicalism. The defense was that the meeting was public and orderly and was held for a lawful purpose; that, while it was held under the auspices of the Communist Party, neither criminal syndicalism nor any unlawful conduct was taught or advocated at the meeting either by appellant or by others. Appellant moved for a direction of acquittal, contending that the statute as applied to him, for merely assisting at a meeting called by the Communist Party at which nothing unlawful was done or advocated, violated the due process clause of the Fourteenth Amendment of the Constitution of the United States. U.S.C.A.Const. amend. 14.

This contention was overruled. Appellant was found guilty as charged and was sentenced to imprisonment for seven years. The judgment was affirmed by the Supreme Court of the State which considered the constitutional question and sustained the statute as thus applied. 152 Or. 315, 51 P.2d 674. The case comes here on appeal.

The record does not present the evidence adduced at the trial. The parties have substituted a stipulation of facts, which was made and filed after the decision of the Supreme Court of the State and after the Chief Justice of that court had allowed the appeal and had directed transmission here of a certified transcript of the record. We do not approve of that practice, where it does not appear that the stipulation has received the approval of the court, as we think that adherence to our rule as to the preparation of records is important for the protection of the court whose decision is under review as well as of this court. See rule 10, 28 U.S.C.A. following section 354. But, as the question presented in this instance does not turn upon an appreciation of the facts on any disputed point, we turn to the merits.

The stipulation, after setting forth the charging part of the indictment, recites in substance the following: That on July 27, 1934, there was held in Portland a meeting which had been advertised by handbills issued by the Portland section of the Communist Party; that the number of persons in attendance was variously estimated at from 150 to 300; that some of those present, who were members of the Communist Party, estimated that not to exceed 10 to 15 per cent. of those in attendance were such members; that the meeting was open to the public without charge and no questions were asked of those entering, with respect to their relation to the Communist Party; that the notice

of the meeting advertised it as a protest against illegal raids on workers' halls and homes and against the shooting of striking longshoremen by Portland police; that the chairman stated that it was a meeting held by the Communist Party; that the first speaker dwelt on the activities of the Young Communist League; that the defendant De Jonge, the second speaker, was a member of the Communist Party and went to the meeting to speak in its name; that in his talk he protested against conditions in the county jail, the action of city police in relation to the maritime strike then in progress in Portland, and numerous other matters; that he discussed the reason for the raids on the Communist headquarters and workers' halls and offices; that he told the workers that these attacks were due to efforts on the part of the steamship companies and stevedoring companies to break the maritime longshoremen's and seamen's strike; that they hoped to break the strike by pitting the longshoremen and seamen against the Communist movement; that there was also testimony to the effect that defendant asked those present to do more work in obtaining members for the Communist Party and requested all to be at the meeting of the party to be held in Portland on the following evening and to bring their friends to show their defiance to local police authority and to assist them in their revolutionary tactics; that there was also testimony that defendant urged the purchase of certain communist literature which was sold at the meeting; that while the meeting was still in progress it was raided by the police; that the meeting was conducted in an orderly manner; that defendant and several others who were actively conducting the meeting were arrested by the police; and that on searching the hall the police found a quantity of communist literature.

The stipulation then set forth various extracts from the literature of the Communist Party to show its advocacy of criminal syndicalism. The stipulation does not disclose any activity by the defendant as a basis for his prosecution other than his participation in the meeting in question. Nor does the stipulation show that the communist literature distributed at the meeting contained any advocacy of criminal syndicalism or of any unlawful conduct. It was admitted by the Attorney General of the State in his argument at the bar of this Court that the literature distributed in the meeting was not of that sort and that the extracts contained in the stipulation were taken from communist literature found elsewhere. Its introduction in evidence was for the purpose of showing that the Communist Party as such did advocate the doctrine of criminal syndicalism, a fact which is not disputed on this appeal.

While the stipulation of facts is but a condensed statement, still much of it is irrelevant in the light of the particular charge of the indictment as construed by the Supreme Court. The indictment charged as follows:

"The said Dirk De Jonge, Don Cluster, Edward R. Denny and Earl Stewart on the 27th day of July, A. D., 1934, in the county of Multnomah and state of Oregon, then and there being, did then and there unlawfully and feloniously preside at, conduct and assist in conducting an assemblage of persons, organization, society and group, to wit: The Communist Party, a more particular description of which said assemblage of persons, organization, society and group is to this grand jury unknown, which said assemblage of persons, organization, society and group did then and there unlawfully and feloniously teach and advocate the doctrine of criminal syndicalism and sabotage, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon."

On the theory that this was a charge that criminal syndicalism and sabotage were advocated at the meeting in question, defendant moved for acquittal, insisting that the evidence was insufficient to warrant his conviction. The trial court denied his motion, and error in this respect was assigned on appeal. The Supreme Court of the State put aside that contention by ruling that the indictment did not charge that criminal syndicalism or sabotage was advocated at the meeting described in the evidence, either by defendant or by any one else. The words of the indictment that "said assemblage of persons, organization, society, and group did then and there unlawfully and feloniously teach and advocate the doctrine of criminal syndicalism and sabotage," referred not to the meeting in question, or to anything then and there said or done by defendant or others, but to the advocacy of criminal syndicalism and sabotage by the Communist Party in Multnomah County. The ruling of the state court upon this point was precise. The court said, 152 Or. 315, at page 330, 51 P.2d 674, 680:

"Turning now to the grounds for a directed verdict set forth in defendant's motion therefor, we note that he asserts and argues that the indictment charges the assemblage at which he spoke with unlawfully and feloniously teaching and advocating the doctrine of criminal syndicalism and sabotage, and elsewhere in the same motion he contends that the indictment charges the defendant with unlawfully and feloniously teaching and advocating said doctrine at said meeting. The indictment does not, however, charge the defendant, nor the assem-

blage, at which he spoke, with teaching or advocating at said meeting at 68 Southwest Alder street, in the city of Portland, the doctrine of criminal syndicalism or sabotage. What the indictment does charge, in plain and concise language, is that the defendant presided at, conducted and assisted in conducting an assemblage of persons, organization, society, and group, to-wit, the Communist Party which said assemblage of persons, organization, society, and group was unlawfully teaching and advocating in Multnomah county the doctrine of criminal syndicalism and sabotage."

In this view, lack of sufficient evidence as to illegal advocacy or action at the meeting became immaterial. Having limited the charge to defendant's participation in a meeting called by the Communist Party, the state court sustained the conviction upon that basis regardless of what was said or done at the meeting.

We must take the indictment as thus construed. Conviction upon a charge not made would be sheer denial of due process. It thus appears that, while defendant was a member of the Communist Party, he was not indicted for participating in its organization, or for joining it, or for soliciting members or for distributing its literature. He was not charged with teaching or advocating criminal syndicalism or sabotage or any unlawful acts, either at the meeting or elsewhere. He was accordingly deprived of the benefit of evidence as to the orderly and lawful conduct of the meeting and that it was not called or used for the advocacy of criminal syndicalism or sabotage or any unlawful action. His sole offense as charged, and for which he was convicted and sentenced to imprisonment for seven years, was that he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party.

The broad reach of the statute as thus applied is plain. While defendant was a member of the Communist Party, that membership was not necessary to conviction on such a charge. A like fate might have attended any speaker, although not a member who "assisted in the conduct" of the meeting. However innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable and timely the discussion, all those assisting in the conduct of the meeting would be subject to imprisonment as felons if the meeting were held by the Communist Party. This manifest result was brought out sharply at this bar by the concessions which the Attorney General made, and could not avoid, in the light of the decision of the state court. Thus, if the Communist Party had called a public meeting in Portland to discuss the tariff, or the foreign policy of the government, or taxation, or relief, or candidacies for the of-

fices of President, members of Congress, Governor, or state legislators, every speaker who assisted in the conduct of the meeting would be equally guilty with the defendant in this case, upon the charge as here defined and sustained. The list of illustrations might be indefinitely extended to every variety of meetings under the auspices of the Communist Party although held for the discussion of political issues or to adopt protests and pass resolutions of an entirely innocent and proper character.

While the States are entitled to protect themselves from the abuse of the privileges of our institutions through an attempted substitution of force and violence in the place of peaceful political action in order to effect revolutionary changes in government, none of our decisions go to the length of sustaining such a curtailment of the right of free speech and assembly as the Oregon statute demands in its present application. In *Gitlow v. People of State of New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138, under the New York statute defining criminal anarchy, the defendant was found to be responsible for a "manifesto" advocating the overthrow of the government by violence and unlawful means. *Id.*, 268 U.S. 652, at pages 656, 662, 663, 45 S.Ct. 625, 628, 69 L.Ed. 1138. In *Whitney v. People of State of California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095, under the California statute relating to criminal syndicalism, the defendant was found guilty of willfully and deliberately assisting in the forming of an organization for the purpose of carrying on a revolutionary class struggle by criminal methods. The defendant was convicted of participation in what amounted to a conspiracy to commit serious crimes. *Id.*, 274 U.S. 357, at pages 363, 364, 367, 379, 47 S.Ct. 641, 644, 645, 649, 71 L.Ed. 1095. The case of *Burns v. United States*, 274 U.S. 328, 47 S.Ct. 650, 71 L.Ed. 1077, involved a similar ruling under the California statute as extended to the Yosemite National Park. *Id.*, 274 U.S. 328, at pages 330, 331, 47 S.Ct. 650, 651, 71 L.Ed. 1077. On the other hand, in *Fiske v. Kansas*, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108, the criminal syndicalism act of that State was held to have been applied unconstitutionally and the judgment of conviction was reversed, where it was not shown that unlawful methods had been advocated. *Id.*, 274 U.S. 380, at page 387, 47 S.Ct. 655, 657, 71 L.Ed. 1108. See, also, *Stromberg v. People of State of California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484.

Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. U.S.C.A.Const. amend. 14. *Gitlow v. New York*, *supra*, 268 U.S. 652, at page 666, 45 S.Ct. 625, 629, 69 L.Ed. 1138; *Stromberg v. California*, *supra*,

283 U.S. 359, at page 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484; *Near v. Minnesota*, 283 U.S. 697, 707, 51 S.Ct. 625, 627, 75 L.Ed. 1357; *Grosjean v. American Press Co.*, 297 U.S. 233, 243, 244, 56 S.Ct. 444, 446, 80 L.Ed. 660. The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. As this Court said in *United States v. Cruikshank*, 92 U.S. 542, 552, 23 L.Ed. 588: "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." The First Amendment of the Federal Constitution, U.S.C.A.Const. amend. 1, expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. *Hebert v. Louisiana*, 272 U.S. 312, 316, 47 S.Ct. 103, 71 L.Ed. 270, 48 A.L.R. 1102; *Powell v. Alabama*, 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 158, 84 A.L.R. 527; *Grosjean v. American Press Co.*, *supra*.

These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their Legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution pro-

fects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that party. The defendant was none the less entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty.

We hold that the Oregon statute as applied to the particular charge as defined by the state court is repugnant to the due process clause of the Fourteenth Amendment. The judgment of conviction is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice STONE took no part in the consideration or decision of this case.

#### NOTE

1. The First Amendment prohibits Congress from making any law "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The process by which similar protections were developed against state action through a re-interpretation of the term "liberty" in the due process clause of the Fourteenth Amendment is traced in C. H. Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 *Harv.L.Rev.* 431 (1926). For discussions of the scope of the First Amendment's protection, see E. S. Corwin, *Freedom of Speech and Press Under the First Amendment*, 30 *Yale L.Jour.* 48 (1920); Z. Chaffee, *Freedom of Speech in War-Time Under the First Amendment*, 32 *Harv.L.Rev.* 932 (1919).

2. Congress has the power to protect the right of assembly and petition against interference by individuals, *U. S. v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876). See J. M. Jarrett and V. A. Mundy, *The Right of Assembly*, 9 *N.Y.U.L.Quar.Rev.* 1 (1931).

3. For other cases considering state interference with the right of assembly and with freedom of discussion of political, social and economic matters, see *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (state Criminal Syndicalism Act sustain-

ed); *Fiske v. Kansas*, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108 (1927) (statute making it a crime to assist in forming an organization for effecting social and political changes by non-violent and peaceable means held invalid); *Stromberg v. California*, 282 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) (statute prohibiting display of a red flag as symbol of opposition to organized government even by peaceable means held invalid); *Herndon v. Lowry*, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066 (1937) (statute held invalid so far as it makes it a crime to persuade others to join the Communist party); *Hague v. C. I. O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (ordinance requiring permit to use public streets or parks to discuss political and economic matters, where city official had full discretion to grant or refuse the permit, held invalid); *Schneider v. New Jersey*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939) (ordinance prohibiting distribution of handbills on public streets unless license were procured held invalid); *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931) (statute authorizing courts to enjoin regular publication of scandalous matters held invalid as imposing prior censorship of press).

4. For a case holding that a license tax on the gross receipts of those engaged in the business of selling advertising printed in newspapers, which the Court construed as a deliberate and calculated device to limit the circulation of information, was an invalid interference with the freedom of the press, see *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936). Cf. *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937) (application of National Labor Relations Act to Associated Press held not violative of First Amendment); and *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1946) (application of federal Fair Labor Standards Act to newspapers held not violative of First Amendment).

5. As to picketing as an exercise of freedom of speech, see *Thornhill v. Alabama* at p. 599.

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### CRAIG v. HARNEY.

Supreme Court of the United States, 1947.  
331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 546.

Mr. Justice DOUGLAS delivered the opinion of the court.

Petitioners were adjudged guilty of constructive criminal contempt by the County Court of Nueces County, Texas, and sentenced to jail for three days. They sought to challenge the legality of their confinement by applying to the Court of Criminal Appeals for a writ of habeas corpus. That court by a divided vote denied the writ and remanded petitioners to the custody of the county sheriff. *Ex parte Craig*, Tex.Cr.App., 193 S.W.2d 178. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem and because the ruling of the Texas court raised doubts whether it conformed to

the principles announced in *Bridges v. State of California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192, 159 A.L.R. 1346, and *Pennekamp v. State of Florida*, 328 U.S. 331, 66 S.Ct. 1029.

Petitioners are a publisher, an editorial writer, and a news reporter of newspapers published in Corpus Christi, Texas. The County Court had before it a forcible detainer case, *Jackson v. Mayes*, whereby Jackson sought to regain possession from Mayes of a business building in Corpus Christi which Mayes (who was at the time in the armed services and whose affairs were being handled by an agent, one Burchard) claimed under a lease. That case turned on whether Mayes' lease was forfeited because of non-payment of rent. At the close of the testimony each side moved for an instructed verdict. The judge instructed the jury to return a verdict for Jackson. That was on May 26, 1945. The jury returned with a verdict for Mayes. The judge refused to accept it and again instructed the jury to return a verdict for Jackson. The jury returned a second time with a verdict for Mayes. Once more the judge refused to accept it and repeated his prior instruction. It being the evening of May 26th and the jury not having complied, the judge recessed the court until the morning of May 27th. Again the jury balked at returning the instructed verdict. But finally it complied, stating that it acted under coercion of the court and against its conscience.

On May 29th Mayes moved for a new trial. That motion was denied on June 6th. On June 4th an officer of the County Court filed with that court a complaint charging petitioners with contempt by publication. The publications referred to were an editorial and news stories published on May 26, 27, 28, 30, and 31 in the newspapers with which petitioners are connected. We have set forth the relevant parts of the publications in the appendix to this opinion. Browning, the judge, who is a layman and who holds an elective office, was criticised for taking the case from the jury. That ruling was called "arbitrary action" and a "travesty on justice." It was deplored that a layman, rather than a lawyer, sat as judge. Groups of local citizens were reported as petitioning the judge to grant Mayes a new trial and it was said that one group had labeled the judge's ruling as a "gross miscarriage of justice." It was also said that the judge's behavior had properly brought down "the wrath of public opinion upon his head," that the people were aroused because a service man "seems to be getting a raw deal," and that there was no way of knowing whether justice was done, "because the first rule of justice giving both sides an opportunity to be heard, was repudiated." And the fact that there could be no appeal from the judge's ruling to a court "familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel" was deplored.

The trial judge concluded that the reports and editorials were designed falsely to represent to the public the nature of the proceedings and to prejudice and influence the court in its ruling on the motion for a new trial then pending. Petitioners contended at the hearing that all that was reported did no more than to create the same impression that would have been created upon the mind of an average intelligent layman who sat through the trial. They disclaimed any purpose to impute unworthy motives to the judge or to advise him how the case should be decided or to bring the court into disrepute. The purpose was to "quicken the conscience of the judge" and to "make him more careful in discharging his duty."

The Court of Criminal Appeals, in denying the writ of *habeas corpus*, stated that the "issue before us" is "whether the publications \* \* \* were reasonably calculated to interfere with the due administration of justice" in the pending case. 193 S.W.2d at page 186. It was held that "there is no escape from the conclusion that it was the purpose and intent of the publishers \* \* \* to force, compel, and coerce Judge Browning to grant Mayes a new trial. The only reason or motive for so doing was because the publishers did not agree with Judge Browning's decision or conduct of the case. According to their viewpoint, Judge Browning was wrong and they took it upon themselves to make him change his decision." *Id.*, 193 S.W.2d at pages 188, 189. The court went on to say that "It is hard to conceive how the public press could have been more forcibly or substantially used or applied to make, force, and compel a judge to change a ruling or decision in a case pending before him than was here done." *Id.*, 193 S.W.2d at page 189. The court distinguished the Bridges case, noting that there the published statements carried threats of future adverse criticism and action on the part of the publisher if the pending matter was not disposed of in accordance with the views of the publisher, that the views of the publisher in the matter were already well-known, and that the Bridges case was not private litigation but a suit in the outcome of which the public had an interest. *Id.*, 193 S.W.2d at page 188. It concluded that the facts of this case satisfied the "clear and present danger" rule of the Bridges case. That test was, in the view of the court, satisfied "because the publications and their purpose were to impress upon Judge Browning (a) that unless he granted the motion for a new trial he would be subjected to suspicion as to his integrity and fairness and to odium and hatred in the public mind; (b) that the safe and secure course to avoid the criticism of the press and public opinion would be to grant the motion and disqualify himself from again presiding at the trial of the case;

and (c) that if he overruled the motion for a new trial, there would be produced in the public mind such a disregard for the court over which he presided as to give rise to a purpose in practice to refuse to respect and obey any order, judgment, or decree which he might render in conflict with the views of the public press." *Id.*, 193 S.W.2d at page 189.

The court's statement of the issue before it and the reasons it gave for holding that the "clear and present danger" test was satisfied have a striking resemblance to the findings which the Court in *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186, held adequate to sustain an adjudication of contempt by publication. That case held that comment on a pending case in a federal court was punishable by contempt if it had a "reasonable tendency" to obstruct the administration of justice. We revisited that case in *Nye v. United States*, 313 U.S. 33, 52, 61 S.Ct. 810, 817, 85 L.Ed. 1172, and disapproved it. And in *Bridges v. State of California*, *supra*, we held that the compulsion of the First Amendment, made applicable to the States by the Fourteenth (*Schneider v. State of New Jersey*, *Town of Irvington*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 108, 63 S.Ct. 870, 872, 891, 87 L.Ed. 1292, 146 A.L.R. 81) forbade the punishment by contempt for comment on pending cases in absence of a showing that the utterances created a "clear and present danger" to the administration of justice. 314 U.S. at pages 260-264, 62 S.Ct. at pages 192-194, 86 L.Ed. 192, 159 A.L.R. 1346. We reaffirmed and reapplied that standard in *Pennekamp v. State of Florida*, *supra*, which also involved comment on matters pending before the court. We stated, 328 U.S. at page 347, 66 S.Ct. at page 1037: "Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."

Neither those cases nor the present one raises questions concerning the full reach of the power of the state to protect the administration of justice by its courts. The problem presented is only a narrow, albeit important, phase of that problem—the power of a court promptly and without a jury trial to punish for comment on cases pending before it and awaiting disposition. The history of the power to punish for contempt (see *Nye v.*

United States, *supra*; *Bridges v. State of California*, *supra*) and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice.

In a case where it is asserted that a person has been deprived by a State court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made. \* \* \* This is such a case.

We start with the news articles. A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire proceedings before it.

The articles of May 26, 27, and 28 were partial reports of what transpired at the trial. They did not reflect good reporting, for they failed to reveal the precise issue before the judge. They said that Mayes, the tenant, had tendered a rental check. They did not disclose that the rental check was post-dated and hence, in the opinion of the judge, not a valid tender. In that sense the news articles were by any standard an unfair report of what transpired. But inaccuracies in reporting are commonplace. Certainly a reporter could not be laid by the heels for contempt because he missed the essential point in a trial or failed to summarize the issues to accord with the views of the judge who sat on the case. Conceivably, a plan of reporting on a case could be so designed and executed as to poison the public mind, to cause a march on the court house, or otherwise so disturb the delicate balance in a highly wrought situation as to imperil the fair and orderly functioning of the judicial process. But it takes more imagination than we possess to find in this rather sketchy and one-sided report of a case any imminent or serious threat to a judge of reasonable fortitude. See *Pennekamp v. State of Florida*, *supra*.

The accounts of May 30 and 31 dealt with the news of what certain groups of citizens proposed to do about the judge's ruling in the case. So far as we are advised, it was a fact that they

planned to take the proposed action. The episodes were community events of legitimate interest. Whatever might be the responsibility of the group which took the action, those who reported it stand in a different position. Even if the former were guilty of contempt, freedom of the press may not be denied a newspaper which brings their conduct to the public eye.

The only substantial question raised pertains to the editorial. It called the judge's refusal to hear both sides "high handed," a "travesty on justice," and the reason that public opinion was "outraged." It said that his ruling properly "brought down the wrath of public opinion upon his head" since a service man "seems to be getting a raw deal." The fact that there was no appeal from his decision to a "judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel and to make his decisions accordingly" was a "tragedy." It deplored the fact that the judge was a "layman" and not a "competent attorney." It concluded that the "first rule of justice" was to give both sides an opportunity to be heard and when that rule was "repudiated," there was "no way of knowing whether justice was done."

This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may not hold in contempt one "who ventures to publish anything that tends to make him unpopular or to belittle him \* \* \*." See *Craig v. Hecht*, 263 U.S. 255, 281, 44 S.Ct. 103, 108, 68 L.Ed. 293, Mr. Justice Holmes dissenting. The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.

We agree with the court below that the editorial must be appraised in the setting of the news articles which both preceded and followed it. It must also be appraised in light of the community environment which prevailed at that time. The fact that the jury was recalcitrant and balked, the fact that it acted under coercion and contrary to its conscience and said so were some index of popular opinion. A judge who is part of such a dramatic episode can hardly help but know that his decision is apt to be unpopular. But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate. Conceivably a campaign could be so managed and so aimed at the sensibilities of a particular judge and the matter pending before him as to cross the forbidden line. But the episodes we have here do not fall in that category. Nor can we assume that the trial judge was not a man of fortitude.

The editorial's complaint was twofold. One objection or criticism was that a layman rather than a lawyer sat on the bench. This is legitimate comment; and its relevancy could hardly be denied at least where judges are elected. In the circumstances of the present case, it amounts at the very most to an intimation that come the next election the newspaper in question will not support the incumbent. But it contained no threat to oppose him in the campaign if the decision on the merits was not overruled, nor any implied reward if it was changed. Judges who stand for reelection run on their records. That may be a rugged environment. Criticism is expected. Discussion of their conduct is appropriate, if not necessary. The fact that the discussion at this particular point of time was not in good taste falls far short of meeting the clear and present danger test.

The other complaint of the editorial was directed at the court's procedure—its failure to hear both sides before the case was decided. There was no attempt to pass on the merits of the case. The editorial, indeed, stated that there was no way of knowing whether justice was done. That criticism of the court's procedure—that it decided the case without giving both sides a chance to be heard—reduces the salient point of the case to a narrow issue. If the point had been made in a petition for rehearing, and reduced to lawyer's language, it would be of trifling consequence. The fact that it was put in layman's language, colorfully phrased for popular consumption, and printed in a newspaper does not seem to us to elevate it to the criminal level. It might well have a tendency to lower the standing of the judge in the public eye. But it is hard to see on these facts how it could obstruct the course of justice in the case before the court. The only demand was for a hearing. There was no demand that the judge reverse his position—or else.

"Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges v. State of California*, supra, 314 U.S. at page 271, 62 S.Ct. at page 197, 86 L.Ed. 192, 159 A.L.R. 1346. But there was here no threat or menace to the integrity of the trial. The editorial challenged the propriety of the court's procedure, not the merits of its ruling. Any such challenge, whether made prior or subsequent to the final disposition of a case, would likely reflect on the competence of the judge in handling cases. But as we have said, the power to punish for contempt depends on a more substantial showing. Giving the editorial all of the vehemence which the court below found in it we fail to see how it could in any realistic sense create an imminent and serious threat to the ability of the court to give fair consideration to the motion for rehearing.

There is a suggestion that the case is different from *Bridges v. State of California*, *supra*, in that we have here only private litigation, while in the *Bridges* case labor controversies were involved, some of them being criminal cases. The thought apparently is that the range of permissible comment is greater where the pending case generates a public concern. The nature of the case may, of course, be relevant in determining whether the clear and present danger test is satisfied. But, the rule of the *Bridges* and *Pennekamp* cases is fashioned to serve the needs of all litigation, not merely select types of pending cases.

Reversed.

Mr. Justice MURPHY concurred. Mr. Justice FRANKFURTER dissented in an opinion concurred in by Chief Justice VINSON.

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### MARTIN v. CITY OF STRUTHERS, OHIO.

Supreme Court of the United States, 1943.  
319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313.

Mr. Justice BLACK delivered the opinion of the Court.

For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants. The question to be decided is whether the City, consistently with the federal Constitution's guarantee of free speech and press, possesses this power.

The appellant, espousing a religious cause in which she was interested—that of the Jehovah's Witnesses—went to the homes of strangers, knocking on doors and ringing doorbells in order to distribute to the inmates of the homes leaflets advertising a religious meeting. In doing so, she proceeded in a conventional and orderly fashion. For delivering a leaflet to the inmate of a home she was convicted in the Mayor's Court and was fined \$10.00 on a charge of violating the following City ordinance:

"It is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing."

The appellant admitted knocking at the door for the purpose of delivering the invitation, but seasonably urged in the lower Ohio state court that the ordinance as construed and applied was beyond the power of the State because in violation of the right of freedom of press and religion as guaranteed by the First and Fourteenth Amendments.

The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, *Lovell v. Griffin*, 303 U.S. 444, 452, 58 S.Ct. 666, 669, 82 L.Ed. 949, and necessarily protects the right to receive it. The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets. *Schneider v. State*, 308 U.S. 147, 162, 60 S.Ct. 146, 151, 84 L.Ed. 155. Yet the peace, good order, and comfort of the community may imperatively require regulation of the time, place and manner of distribution. *Cantwell v. Connecticut*, 310 U.S. 296, 304, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 128 A.L.R. 1352. No one supposes, for example, that a city need permit a man with a communicable disease to distribute leaflets on the street or to homes, or that the First Amendment prohibits a state from preventing the distribution of leaflets in a church against the will of the church authorities.

We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not. The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder. It submits the distributor to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it. In considering legislation which thus limits the dissemination of knowledge, we must "be astute to examine the effect of the challenged legislation" and must "weigh the circumstances and \* \* \* appraise the substantiality of the reasons advanced in support of the regulation." *Schneider v. State*, *supra*, 308 U.S. 161, 60 S.Ct. 151, 84 L.Ed. 155.

Ordinances of the sort now before us may be aimed at the protection of the householders from annoyance, including intrusion upon the hours of rest, and at the prevention of crime. Constant callers, whether selling pots or distributing leaflets, may lessen the peaceful enjoyment of a home as much as a neighborhood glue factory or railroad yard which zoning ordinances may prohibit. In the instant case, for example, it is clear from the record that the householder to whom the appellant gave the leaflet which led to her arrest was more irritated than pleased with her visitor. The City, which is an industrial community most of whose residents are engaged in the iron and steel industry, has vigorously argued that its inhabitants frequently work on swing shifts, working nights and sleeping days so that casual bell pushers might seriously interfere with the hours of sleep although they call at high noon. In addition, burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later. Crime prevention may thus be the purpose of regulatory ordinances.

While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance. "Pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people." *Schneider v. State*, supra, 308 U.S. 164, 60 S.Ct. 152, 84 L.Ed. 155. Many of our most widely established religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house. Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people.

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of

a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away. The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers. In any case the problem must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributors from the home.

The Struthers ordinance does not safeguard these constitutional rights. For this reason, and wholly aside from any other possible defects, on which we do not pass but which are suggested in other opinions filed in this case, we conclude that the ordinance is invalid because in conflict with the freedom of speech and press.

The judgment below is reversed for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice MURPHY concurred in an opinion joined in by Justices DOUGLAS and RUTLEDGE. Mr. Justice REED dissented in an opinion joined in by Justices ROBERTS and JACKSON. Mr. Justice FRANKFURTER wrote a separate opinion.

## NOTE

1. There have been numerous decisions involving the licensing, taxation and regulation of distribution of religious literature by Jehovah's Witnesses in public places and by house to house canvassing. These have been thoroughly discussed by Edward F. Waite, *The Debt of Constitutional Law to Jehovah's Witnesses*, 28 Minn.L.Rev. 209 (1944). In two cases decided after that article appeared the protection of the Witnesses in their right to distribute their literature was extended to the streets of a "company" town, *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), and to its distribution by house to house canvassing in a village owned by the United States Housing Authority, *Tucker v. Texas*, 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274 (1946).

2. State requirement that public school children shall participate in a Flag Salute ceremony as condition to remaining in school was first sustained as applied to children of Jehovah's Witnesses, *Minersville School District v. Gobitis*, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940), and later held a violation of their religious freedom in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). See also *Taylor v. Mississippi*, 319 U.S. 583, 63 S.Ct. 1200, 87 L.Ed. 1600 (1943).

3. The application of state statute prohibiting girls under a certain age to sell magazines in any street or public place does not, as applied to a Jehovah's Witness, violate her religious freedom, *321 U.S. 158*, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

4. Refusal to admit to the bar a person who, on the basis of his religion, declines to take an oath involving a pledge of willingness to bear arms, does not violate such person's religious freedom, *In re Summers*, 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1795 (1945); see C. W. Summers, *The Sources and Limits of Religious Freedom*, 41 Ill.L.Rev. 53 (1946).

5. The conveyance of children to and from parochial schools by public authorities is not a violation of the principle of religious freedom, *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). It is doubtful whether this is still good law in view of the decision in *People of State of Illinois ex rel. McCollum v. Bd. of Education, etc.*, noted in Note 2 at p. 669. See Comment, *Constitutional Law—Establishment of Religion, Due Process and Equal Protection—Public Aid to Parochial Schools*, 45 Mich.L.Rev. 1001 (1947); Note, *Public Funds for Sectarian Schools*, 60 Harv.L.Rev. 793 (1947).

6. For cases discussing scope of religious freedom under the First Amendment, see *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1890); *U. S. v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944).

## OKLAHOMA PRESS PUBLISHING CO. v. WALLING.

Supreme Court of the United States, 1946.  
327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614.

Mr. Justice RUTLEDGE delivered the opinion of the Court.

These cases bring for decision important questions concerning the Administrator's right to judicial enforcement of subpoenas duces tecum issued by him in the course of investigations conducted pursuant to § 11(a) of the Fair Labor Standards Act, 52 Stat. 1060, 29 U.S.C.A. § 211(a). His claim is founded directly upon § 9, 29 U.S.C.A. § 209, which incorporates the enforcement provisions of §§ 9 and 10 of the Federal Trade Commission Act, 38 Stat. 717, 15 U.S.C.A. §§ 49, 50. The subpoenas sought the production of specified records to determine whether petitioners were violating the Fair Labor Standards Act, including records relating to coverage. Petitioners, newspaper publishing corporations, maintain that the Act is not applicable to them, for constitutional and other reasons, and insist that the question of coverage must be adjudicated before the subpoenas may be enforced.

In No. 61, involving the Oklahoma Press Publishing Company, the Circuit Court of Appeals for the Tenth Circuit has rejected this view, holding that the Administrator was entitled to enforcement upon showing of "probable cause," which it found had been made. 147 F.2d 658. Accordingly it affirmed the District Court's order directing that the Administrator be given access to the records and documents specified.

In No. 63, the Circuit Court of Appeals for the Third Circuit likewise rejected the company's position, one judge dissenting on the ground that probable cause had not been shown. 148 F.2d 57. It accordingly reversed the District Court's order of dismissal in the proceeding to show cause, which in effect denied enforcement for want of a showing of coverage. Application of Walling, 49 F.Supp. 659. The Court of Appeals thought that requiring the Administrator "to make proof of coverage would be to turn the proceeding into a suit to decide a question which must be determined by the Administrator in the course of his investigation" [148 F.2d 60], and relied upon *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 63 S.Ct. 339, 87 L.Ed. 424, as being persuasive that this could not be done. Regarding the subpoena as containing no unreasonable demand, it conceived the return and affidavits filed by the company, together with the Administrator's allegations of coverage, as a showing sufficient to

require enforcement. Hence it directed that the District Court's discretion be exercised with that effect.

Because of the importance of the issues for administration of the Act and also on account of the differences in the grounds for the two decisions, as well as between them and decisions from other circuits, certiorari was granted in both cases. 325 U.S. 845, 65 S.Ct. 1200, 1201.

The issues have taken wide range. They are substantially the same in the two causes, except in one respect to be noted. In addition to an argument from Congress' intent, reliance falls upon various constitutional provisions, including the First, Fourth and Fifth Amendments, as well as the limited reach of the commerce clause, to show that the Administrator's conduct and the relief he seeks are forbidden. \* \* \*

Other questions pertain to whether enforcement of the subpoenas as directed by the Circuit Courts of Appeals will violate any of petitioners' rights secured by the Fourth Amendment and related issues concerning Congress' intent. It is claimed that enforcement would permit the Administrator to conduct general fishing expeditions into petitioners' books, records and papers, in order to secure evidence that they have violated the Act, without a prior charge or complaint and simply to secure information upon which to base one, all allegedly in violation of the Amendment's search and seizure provisions. Supporting this is an argument that Congress did not intend such use to be made of the delegated power, which rests in part upon asserted constitutional implications, but primarily upon the reports of legislative committees, particularly in the House of Representatives, made in passing upon appropriations for years subsequent to the Act's effective date.

The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections, which in fact were made. Nor has any objection been taken to the breadth of the subpoenas or to any other specific defect which would invalidate them.

What petitioners seek is not to prevent an unlawful search and seizure. It is rather a total immunity to the Act's provisions,

applicable to all others similarly situated, requiring them to submit their pertinent records for the Administrator's inspection under every judicial safeguard, after and only after an order of court made pursuant to and in exact compliance with authority granted by Congress. This broad claim of immunity no doubt is induced by petitioners' First Amendment contentions. But beyond them it is rested also upon conceptions of the Fourth Amendment equally lacking in merit.

Petitioners' plea that the Fourth Amendment places them so far above the law that they are beyond the reach of congressional and judicial power as those powers have been exerted here only raises the ghost of controversy long since settled adversely to their claim. They have advanced no claim founded on the Fifth Amendment's somewhat related guaranty against self-incrimination, whether or not for the sufficient reason among others that this privilege gives no protection to corporations or their officers against the production of corporate records pursuant to lawful judicial order, which is all these cases involve.

The cited authorities would be sufficient to dispose of the Fourth Amendment argument, and more recent decisions confirm their ruling. Petitioners however are insistent in their contrary views, both upon the constitutional phases and in their asserted bearing upon the intention of Congress. While we think those views reflect a confusion not justified by the actual state of the decisions the confusion has acquired some currency, as the divided state of opinion among the circuits shows. Since the matter is of some importance, in order to remove any possible basis for like misunderstanding in the future, we give more detailed consideration to the views advanced and to the authorities than would otherwise be necessary. \* \* \*

### III.

The primary source of misconception concerning the Fourth Amendment's function lies perhaps in the identification of cases involving so-called "figurative" or "constructive" search with cases of actual search and seizure. Only in this analogical sense can any question related to search and seizure be thought to arise in situations which, like the present ones, involve only the validity of authorized judicial orders.

The confusion is due in part to the fact that this is the very kind of situation in which the decisions have moved with variant direction, although without actual conflict when all of the facts in each case are taken into account. Notwithstanding this, emphasis and tone at times are highly contrasting, with consequent overtones of doubt and confusion for validity of the statute or its

application. The subject matter perhaps too often has been generative of heat rather than light, for the border along which the cases lie is one where government intrudes upon different areas of privacy and the history of such intrusions has brought forth some of the stoutest and most effective instances of resistance to excess of governmental authority.

The matter of requiring the production of books and records to secure evidence is not as one-sided, in this kind of situation, as the most extreme expressions of either emphasis would indicate. With some obvious exceptions, there has always been a real problem of balancing the public interest against private security. The cases for protection of the opposing interests are stated as clearly as anywhere perhaps in the summations, quoted in the margin, of two former members of this Court, each of whom was fully alive to the dual necessity of safeguarding adequately the public and the private interest. But emphasis has not always been so aptly placed.

The confusion, obscuring the basic distinction between actual and so-called "constructive" search has been accentuated where the records and papers sought are of corporate character, as in these cases. Historically private corporations have been subject to broad visitorial power, both in England and in this country. And it long has been established that Congress may exercise wide investigative power over them, analogous to the visitorial power of the incorporating state, when their activities take place within or affect interstate commerce correspondingly it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters. As has been noted, they are not at all within the privilege against self-incrimination, although this Court more than once has said that the privilege runs very closely with the Fourth Amendment's search and seizure provisions. It is also settled that an officer of the company cannot refuse to produce its records in his possession, upon the plea that they either will incriminate him or may incriminate it. And, although the Fourth Amendment has been held applicable to corporations notwithstanding their exclusion from the privilege against self-incrimination, the same leading case of *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771, Ann.Cas.1912D, 558, distinguishing the earlier quite different one of *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, held the process not invalid under the Fourth Amendment, although it broadly required the production of copies of letters and telegrams "signed or purport[ed] to be signed by the president of said company during

the month[s] of May and June, 1909, in regard to an alleged violation of the statutes of the United States by C. C. Wilson." 221 U.S. at pages 368, 375, 31 S.Ct. at page 539, 55 L.Ed. 771, Ann. Cas. 1912D, 558.

The Wilson case has set the pattern of later decisions and has been followed without qualification of its ruling. Contrary suggestions or implications may be explained as dicta; or by virtue of the presence of an actual illegal search and seizure, the effects of which the Government sought later to overcome by applying the more liberal doctrine devolved in relation to "constructive search"; or by the scope of the subpoena in calling for documents so broadly or indefinitely that it was thought to approach in this respect the character of a general warrant or writ of assistance, odious in both English and American history. But no case has been cited or found in which upon similar facts, the Wilson doctrine has not been followed. Nor in any has Congress been adjudged to have exceeded its authority, with the single exception of *Boyd v. United States*, supra, which differed from both the Wilson case and the present ones in providing a drastically incriminating method of enforcement which was applied to the production of partners' business records. Whatever limits there may be to congressional power to provide for the production of corporate or other business records, therefore, they are not to be found, in view of the course of prior decisions, in any such absolute or universal immunity as petitioners seek.

Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

As this has taken form in the decisions, the following specific results have been worked out. It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. This has been

ruled most often perhaps in relation to grand jury investigations, but also frequently in respect to general or statistical investigations authorized by Congress. The requirement of "probable cause, supported by oath or affirmation" literally applicable in the case of a warrant is satisfied, in that of an order for production, by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the person or things to be seized," also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.

When these principles are applied to the facts of the present cases, it is impossible to conceive how a violation of petitioners' rights could have been involved. Both were corporations. The only records or documents sought were corporate ones. No possible element of self-incrimination was therefore presented or in fact claimed. All the records sought were relevant to the authorized inquiry, the purpose of which was to determine two issues, whether petitioners were subject to the Act and, if so, whether they were violating it. These were subjects of investigation authorized by § 11(a), the latter expressly, the former by necessary implication. It is not to be doubted that Congress could authorize investigation of these matters. In all these respects, the specifications more than meet the requirements long established by many precedents. \* \* \*

In these results under the later as well as the earlier decisions, the basic compromise has been worked out in a manner to secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection rightfully may be claimed. The latter are not identical with those protected against invasion by actual search and seizure, nor are the threatened abuses the same. They are rather the interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest. Officious examination can be expensive, so much so that it eats up men's substance. It can be

time consuming, clogging the processes of business. It can become persecution when carried beyond reason.

On the other hand, petitioners' view if accepted would stop much if not all of investigation in the public interest at the threshold of inquiry and, in the case of the Administrator, is designed avowedly to do so. This would render substantially impossible his effective discharge of the duties of investigation and enforcement which Congress has placed upon him. And if his functions could be thus blocked, so might many others of equal importance.

We think, therefore, that the Courts of Appeals were correct in the view that Congress has authorized the Administrator, rather than the District Courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon that question, by seeking the production of petitioners' relevant books, records and papers; and, in case of refusal to obey his subpoena, issued according to the statute's authorization, to have the aid of the District Court in enforcing it. No constitutional provision forbids Congress to do this. On the contrary, its authority would seem clearly to be comprehended in the "necessary and proper" clause, as incidental to both its general legislative and its investigative powers.

#### IV.

What has been said disposes of petitioners' principal contention upon the sufficiency of the showing. Other assignments, however, present the further questions whether any showing is required beyond the Administrator's allegations of coverage and relevance of the required materials to that question; and, if so, of what character. Stated otherwise they are whether the court may order enforcement only upon a finding of "probable cause," that is, probability in fact, of coverage, as was held by the Court of Appeals for the Tenth Circuit in No. 61, following the lead of the Eighth Circuit in *Walling v. Benson*, 137 F.2d 501, 149 A.L.R. 186, or may do so upon the narrower basis accepted by the Third Circuit in No. 63.

The showing in No. 61 was clearly sufficient to constitute "probable cause" in this sense under conceptions of coverage prevailing at the time of the hearing, whether or not that showing was necessary. Accordingly the judgment in that case must be affirmed.

In No. 63 the showing was less extensive, and it is doubtful that it would constitute "probable cause" of coverage as that term was

used in the decisions from the Tenth and Eighth Circuits. The Court of Appeals for the Third Circuit did not so label it, but held the showing sufficient.

Congress has made no requirements in terms of any showing of "probable cause"; and, in view of what has already been said, any possible constitutional requirement of that sort was satisfied by the Administrator's showing in this case, including not only the allegations concerning coverage, but also that he was proceeding with his investigation in accordance with the mandate of Congress and that the records sought were relevant to that purpose. Actually, in view of today's ruling in *Mabee v. White Plains Pub. Co.*, supra, the showing here, including the facts supplied by the response, was sufficient to establish coverage itself, though that was not required.

The result therefore sustains the Administrator's position that his investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's or the court's in issuing other pre-trial orders for the discovery of evidence, and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be "limited \* \* \* by \* \* \* forecasts of the probable result of the investigation \* \* \*." *Blair v. United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979; cf. *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652. Nor is the judicial function either abused or abased, as has been suggested, by leaving to it the determination of the important questions which the Administrator's position concedes the courts may decide. \* \* \*

Accordingly the judgments in both causes, No. 61 and No. 63, are affirmed.

Affirmed.

Mr. Justice MURPHY dissented.

#### NOTE

1. See also *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906); *Silverthorne Lbr. Co. v. U. S.*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); *O. K. Fraenkel, Concerning Searches and Seizures*, 34 Harv.L.Rev. 361 (1921); *M. Handler, Constitutionality of Investigations by the Federal Trade Commission*, 28 Col. L.Rev. 708, 903 (1928). *A. Langeluttig, Constitutional Limitations on the Administrative Power of Investigation*, 28 Ill.L.Rev. 508 (1934); *David E. Lilienthal, The Power of Governmental Agencies to Compel Testimony*, 39 Harv.L.Rev. 694 (1926).

## CHAPTER 20

### LIMITS ON THE DEFINITION OF CRIME AND THE ENFORCEMENT OF CRIMINAL LAW

#### UNITED STATES v. L. COHEN GROCERY CO.

Supreme Court of the United States, 1921. 255 U.S. 81, 41 S.Ct. 298,  
65 L.Ed. 516, 14 A.L.R. 1045.

Mr. Chief Justice WHITE delivered the opinion of the Court.

Required on this direct appeal to decide whether Congress under the Constitution had authority to adopt section 4 of the Lever Act as re-enacted in 1919, we reproduce the section so far as relevant (Act Oct. 22, 1919, tit. 1, c. 80, § 2, 41 Stat. 297):

"That it is hereby made unlawful for any person willfully  
\* \* \* to make any unjust or unreasonable rate or charge  
in handling or dealing in or with any necessities; to conspire,  
combine, agree, or arrange with any other person \* \* \*  
(e) to exact excessive prices for any necessities. \* \* \*  
Any person violating any of the provisions of this section upon  
conviction thereof shall be fined not exceeding \$5,000 or be  
imprisoned for not more than two years, or both. \* \* \*"

The text thus reproduced is followed by two provisos exempting from the operation either of the section or of the act enumerated persons or classes of persons engaged in agricultural or similar pursuits.

Comparing the re-enacted section with the original text (Act Aug. 10, 1917, c. 53, § 4, 40 Stat. 276), it will be seen that the only changes made by the re-enactment were the insertion of the penalty clause and an enlargement of the enumerated exemptions.

In each of two counts the defendant, the Cohen Grocery Company, alleged to be a dealer in sugar and other necessities in the city of St. Louis, was charged with violating this section by willfully and feloniously making an unjust and unreasonable rate and charge in handling and dealing in a certain necessary; the specification in the first count being a sale for \$10.07 of

about 50 pounds of sugar, and that in the second, of a 100-pound bag of sugar for \$19.50.

The defendant demurred on the following grounds: (a) That both counts were so vague as not to inform it of the nature and cause of the accusation; (b) that the statute upon which the indictment was based was subject to the same infirmity because it was so indefinite as not to enable it to be known what was forbidden, and therefore amounted to a delegation by Congress of legislative power to courts and juries to determine what acts should be held to be criminal and punishable; and (c) that as the country was virtually at peace Congress had no power to regulate the subject with which the section dealt. In passing on the demurrer the court, declaring that this court had settled that until the official declaration of peace there was a status of war, nevertheless decided that such conclusion was wholly negligible as to the other issues raised by the demurrer, since it was equally well settled by this court that the mere status of war did not of its own force suspend or limit the effect of the Constitution, but only caused limitations which the Constitution made applicable as the necessary and appropriate result of the status of war, to become operative. Holding that this latter result was not the case as to the particular provisions of the Fifth and Sixth Amendments, U.S.C.A. Const. Amends. 5, 6, which it had under consideration; that is, as to the prohibitions which those amendments imposed upon Congress against delegating legislative power to courts and juries, against penalizing indefinite acts, and against depriving the citizen of the right to be informed of the nature and cause of the accusation against him, the court, giving effect to the amendments in question, came to consider the grounds of demurrer relating to those subjects. In doing so and referring to an opinion previously expressed by it in charging a jury, the court said:

"Congress alone has power to define crimes against the United States. This power cannot be delegated either to the courts or to the juries of this country. \* \* \*

"Therefore, because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained."

The indictment was therefore quashed. \* \* \*

We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon. *Ex parte Milligan*, 4 Wall. 2, 121-127, 18 L.Ed. 281; *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336, 13 S.Ct. 622, 37 L.Ed. 463; *United States v. Joint Traffic Association*, 171 U.S. 505, 571, 19 S.Ct. 25, 43 L.Ed. 259; *McCray v. United States*, 195 U.S. 27, 61, 24 S.Ct. 769, 49 L.Ed. 78, 1 Ann.Cas. 561; *United States v. Cress*, 243 U.S. 316, 326; *Hamilton v. Kentucky Distilleries Company*, 251 U.S. 146, 156, 40 S.Ct. 106, 64 L.Ed. 194. It follows that in testing the operation of the Constitution upon the subject here involved the question of the existence or nonexistence of a state of war becomes negligible, and we put it out of view.

The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words "that it is hereby made unlawful for any person willfully \* \* \* to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities," constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction, finds abundant demonstration in the cases now before us, since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed. \* \* \* And again, this condition would be additionally obvious if we stopped to recur to the per-

sistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution.

That it results from the consideration which we have stated that the section before us was void for repugnancy to the Constitution is not open to question. *United States v. Reese*, 92 U.S. 214, 219-220, 23 L.Ed. 563; *United States v. Brewer*, 139 U.S. 278, 288, 11 S.Ct. 538, 35 L.Ed. 190; *Todd v. United States*, 158 U.S. 278, 282, 15 S.Ct. 889, 39 L.Ed. 982. And see *United States v. Sharp*, 27 Fed.Cas. 1041, 1043; *Chicago & Northwestern R. R. Co. v. Dey*, C.C., 35 Fed. 866, 876, 1 L.R.A. 744; *Tozer v. United States*, C.C., 52 F. 917, 919, 920; *United States v. Capital Traction Co.*, 34 App.D.C. 592, 19 Ann.Cas. 68; *United States v. Pennsylvania R. R. Co.*, 242 U.S. 208, 237-238, 37 S.Ct. 95, 61 L.Ed. 251.

But decided cases are referred to which it is insisted sustain the contrary view. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 29 S.Ct. 220, 53 L.Ed. 417; *Nash v. United States*, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 123; *Fox v. State of Washington*, 236 U.S. 273, 35 S.Ct. 383, 59 L.Ed. 573; *Miller v. Strahl*, 239 U.S. 426, 36 S.Ct. 147, 60 L.Ed. 364; *Omaechevarria v. Idaho*, 246 U.S. 343, 38 S.Ct. 323, 62 L.Ed. 763. We need not stop to review them, however, first, because their inappositeness is necessarily demonstrated when it is observed that if the contention as to their effect were true it would result, in view of the text of the statute, that no standard whatever was required, no information as to the nature and cause of the accusation was essential, and that it was competent to delegate legislative power, in the very teeth of the settled significance of the Fifth and Sixth Amendments and of other plainly applicable provisions of the Constitution; and, second, because the cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded. Indeed, the distinction between the cases relied upon and those establishing the general principle to which we have referred, and which we now apply and uphold as a matter of reason and authority, is so clearly pointed out in decided cases that we deem it only necessary to cite them. *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221, 34 S.Ct. 853, 58 L.Ed. 1284; *Collins v. Kentucky*, 234 U.S. 634, 637, 34 S.Ct. 924, 58 L.Ed. 1510; *American Seeding Machine Co. v. Kentucky*, 236 U.S. 660, 662, 35 S.Ct. 456, 59 L.Ed. 773. And see *United States v. Pennsylvania R. R. Co.*, 242 U.S. 208, 237, 238, 37 S.Ct. 95, 61 L.Ed. 251.

It follows from what we have said that, not forgetful of our duty to sustain the constitutionality of the statute if ground can possibly be found to do so, we are nevertheless compelled in this case to say that we think the court below was clearly right in holding the statute void for repugnancy to the Constitution, and its judgment quashing the indictment on that ground must be, and it is, hereby affirmed.

Affirmed.

Mr. Justice PITNEY and Mr. Justice BRANDEIS concur in the result.

#### NOTE

1. See also *U. S. v. Petrillo*, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947); *Winters v. People of State of New York*, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. — (1948).

2. The due process clause of the Fourteenth Amendment imposes upon the states a limitation similar to that imposed upon the United States by the decision in the reported case, *International Harvester Co. v. Kentucky*, 234 U.S. 216, 34 S.Ct. 853, 58 L.Ed. 1284 (1914); *Lanzetta v. State*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939).

3. See R. W. Aigler, *Legislation in Vague and General Terms*, 21 Mich.L.Rev. 831 (1923).

4. The extent to which due process requires conscious intent to do wrong as an element in the definition of a crime is considered in *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 30 S.Ct. 663, 54 L.Ed. 930 (1910); *Rosenthal v. New York*, 226 U.S. 260, 33 S.Ct. 27, 57 L.Ed. 212 (1912); *N. Y. C. & H. R. R. Co. v. U. S.*, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613 (1909). See C. E. Laylin and A. H. Tuttle, *Due Process and Punishment*, 20 Mich.L.Rev. 614 (1922).

## CALDER v. BULL.

Supreme Court of United States, 1798. 3 Dall. 386, 1 L.Ed. 648.

[Error to the Supreme Court of Connecticut. In March, 1793, the probate court for Hartford disapproved the will of Normand Morrison, under which Bull claimed, the result being that a right to recover certain property vested in Calder and his wife as heir of said Morrison. More than eighteen months later, after Bull's right of appeal had been barred by statute, the legislature in May, 1795, passed an act setting aside the decree of the probate court and granting Bull a new trial. On this trial the will was approved and Bull's claim was upheld, which was later affirmed by the state Supreme Court.]

Mr. Justice CHASE. \* \* \* The sole inquiry is, whether this resolution or law of Connecticut, having such operation, is an ex post facto law within the prohibition of the federal Constitution? \* \* \*

All the restrictions contained in the Constitution of the United States, on the power of the state legislatures, were provided in favor of the authority of the federal government. The prohibition against their making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge that the Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less punishment. These acts were legislative judgments; and an exercise of judicial power. Sometimes they respected the crime, by declaring acts to be treason which were not treason when committed; at other times they violated the rules of evidence, to supply a deficiency of legal proof, by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony which the courts of justice would not admit; at other times they inflicted punishments where the party was not by law liable to any punishment; and in other cases they inflicted greater punishment than the law annexed to the offence. The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender; as if traitors, when discovered, could be so formidable, or the government so insecure. With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment and vindictive malice. To prevent such, and similar acts of violence and injustice, I believe the federal and state legislatures were prohibited from passing any bill of attainder, or any ex post facto law.

The Constitution of the United States, art. 1, § 9, U.S.C.A. Const. art. 1, § 9, prohibits the legislature of the United States from passing any ex post facto law; and in section 10 lays several restrictions on the authority of the legislatures of the several states; and among them, "that no state shall pass any ex post facto law."

It may be remembered that the legislatures of several of the states, to wit, Massachusetts, Pennsylvania, Delaware, Maryland, and North and South Carolina, are expressly prohibited, by their state Constitutions, from passing any ex post facto law.

I shall endeavor to show what law is to be considered an ex post facto law, within the words and meaning of the prohibition in the federal Constitution. The prohibition, "that no state shall pass any ex post facto law," necessarily requires some explanation; for naked and without explanation it is unintelligible, and means nothing. Literally it is only that a law shall not be passed concerning, and after the fact, or thing done, or action committed. I would ask, what fact; of what nature or kind; and by whom done? That Charles I, King of England, was beheaded; that Oliver Cromwell was Protector of England; that Louis XVI, late King of France, was guillotined,—are all facts that have happened, but it would be nonsense to suppose that the states were prohibited from making any law after either of these events, and with reference thereto. The prohibition in the letter is not to pass any law concerning and after the fact, but the plain and obvious meaning and intention of the prohibition is this, that the legislatures of the several states shall not pass laws after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights, of either property or contracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any ex post facto law, was to secure the person of the subject from injury or punishment, in consequence of such law. If the prohibition against making ex post facto laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary, and therefore improper, for both of them are retrospective.

I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited. Every law that takes away or impairs rights vested, agreeable to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning, and after, the facts committed. But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful, and the making an innocent action criminal, and punishing it as a crime. The expressions "*ex post facto* laws" are technical; they had been in use long before the Revolution, and had acquired an appropriate meaning by legislators, lawyers, and authors. The celebrated and judicious Sir William Blackstone, in his Commentaries, considers an *ex post facto* law precisely in the same light as I have done. His opinion is confirmed by his successor, Mr. Wooddeson, and by the author of the Federalist, whom I esteem superior to both, for his extensive and accurate knowledge of the true principles of government.

I also rely greatly on the definition, or explanation of *ex post facto* laws as given by the conventions of Massachusetts. Mary.

land, and North Carolina, in their several Constitutions, or forms of government. \* \* \* [Here follow quotations from these Constitutions, expressly forbidding retrospective criminal laws.]

I am of opinion, that the fact, contemplated by the prohibition, and not to be affected by a subsequent law, was some fact to be done by a citizen or subject. In 2 Lord Raymond, 1352, Raymond, J., called the Stat. 7 Geo. I, stat. 2, pt. 8, about registering contracts for South Sea stock, an *ex post facto* law; because it affected contracts made before the statute. \* \* \* There is no doubt that a man may be a trespasser from the beginning, by matter of after fact; as where an entry is given by law, and the party abuses it; or where the law gives a distress, and the party kills, or works the distress. I admit, an act unlawful in the beginning may, in some cases, become lawful by matter of after fact. \* \* \* There appears to me a manifest distinction between the case where one fact relates to, and affects another fact, as where an after fact, by operation of law, makes a former fact either lawful or unlawful; and the case where a law made after a fact done, is to operate on, and to affect such fact. In the first case both the acts are done by private persons. In the second case the first act is done by a private person, and the second act is done by the legislature to affect the first act. I believe that but one instance can be found in which a British judge called a statute that affected contracts made before the statute, an *ex post facto* law; but the judges of Great Britain always considered penal statutes, that created crimes, or increased the punishment of them, as *ex post facto* laws.

If the term *ex post facto* law is to be construed to include and to prohibit the enacting any law after a fact, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen. If the prohibition to make no *ex post facto* law extends to all laws made after the fact, the two prohibitions, not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were improper and unnecessary.

It was further urged, that if the provision does not extend to prohibit the making any law after a fact, then all choses in action, all lands by devise, all personal property by bequest or distribution, by elegit, by execution, by judgments, particularly on torts, will be unprotected from the legislative power of the states; rights vested may be divested at the will and pleasure of the state legislatures; and, therefore, that the true construction and meaning of the prohibition is, that the states pass no

law to deprive a citizen of any right vested in him by existing laws. It is not to be presumed that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws; unless for the benefit of the whole community; and on making full satisfaction. The restraint against making any ex post facto laws was not considered, by the framers of the Constitution, as extending to prohibit the depriving a citizen even of a vested right to property; or the provision, "that private property should not be taken for public use, without just compensation," was unnecessary. \* \* \*

Decree affirmed.

[The concurring opinions of PATERSON, IREDELL, and CUSHING, JJ., are omitted.]

### NOTE

1. On the general subject of ex post facto legislation see O. P. Field, *Ex Post Facto in the Constitution*, 20 Mich.L.Rev. 315 (1922); P. P. McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 Calif.L.Rev. 269 (1927).

2. A statute punishing the continuation after its effective date of a relation or status created in whole or in part by acts occurring prior thereto, or punishing subsequent acts in furtherance of or incidental to such relation or status, is not deemed ex post facto since it punishes not the prior act of entering into such relation or status but acts occurring after the effective date of the act; *Samuels v. McCurdy*, 267 U.S. 188, 45 S.Ct. 264, 69 L.Ed. 568 (1925); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 29 S.Ct. 220, 53 L.Ed. 417 (1909); *U. S. v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007 (1897).

3. Legislation enacted after the commission of a crime which changes the punishment therefor violates ex post facto provisions of constitutions only if it requires imposing a penalty that may be more severe than the least one that could be imposed under the former law, or permits a penalty more severe than the heaviest one authorized by the former law. Cases considering when the prohibited result is present or absent are *Rooney v. North Dakota*, 196 U.S. 319, 25 S.Ct. 264, 49 L.Ed. 494 (1905) (change in place of executing death sentence held valid); *Malloy v. South Carolina*, 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905 (1915) (substituting death by electrocution for death by hanging held valid); *Ex parte Medley*, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835 (1890) (adding solitary confinement during period while convicted person was awaiting execution of death sentence held invalid); *Lindsey v. Washington*, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937) (statute making maximum punishment mandatory, although it was permissive under prior law, held ex post facto).

4. A statute imposing heavier penalties upon habitual criminals is not ex post facto even though enacted subsequent to the commission of the crimes furnishing the basis for inflicting the heavier penalties, *McDonald v. Massachusetts*, 180 U.S. 311, 21 S.Ct. 389, 45 L.Ed. 542 (1901).

## HAWKER v. NEW YORK.

Supreme Court of United States, 1898. 170 U.S. 189, 18 S.Ct. 573,  
42 L.Ed. 1002.

[Error to the Court of Sessions of New York City. The defendant had been convicted of the crime of abortion in New York in 1878 and sentenced to ten years imprisonment. A New York statute of 1893, amended in 1895, made it a misdemeanor for any person to practice medicine after conviction of a felony. The defendant was convicted under this statute and the conviction affirmed by the highest state court; final judgment being entered in the said Court of Sessions.]

Mr. Justice BREWER. The single question presented is as to the constitutionality of this statute when applied to one who had been convicted of a felony prior to its enactment. \* \* \*

On the one hand, it is said that defendant was tried, convicted, and sentenced for a criminal offense. He suffered the punishment pronounced. The legislature has no power to thereafter add to that punishment. The right to practice medicine is a valuable property right. To deprive a man of it is in the nature of punishment, and, after the defendant has once fully atoned for his offense, a statute imposing this additional penalty is one simply increasing the punishment for the offense, and is *ex post facto*.

On the other, it is insisted that, within the acknowledged reach of the police power, a state may prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine. It may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the state is not possessed of sufficient good character, it can deny to such a one the right to practice medicine; and, further, it may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law, and of the absence of the requisite good character. In support of this latter argument, counsel for the state, besides referring to the legislation of many states prescribing in a general way good character as one of the qualifications of a physician, has made a collection of special provisions as to the effect of a conviction of felony.

We are of opinion that this argument is the more applicable, and must control the answer to this question. No precise limits have been placed upon the police power of a state, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly be-

longing to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting, not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. These propositions have been often affirmed. In *Dent v. West Virginia*, 129 U.S. 114, 122, 9 S.Ct. 231, 233, 32 L.Ed. 623, it was said in respect to the qualifications of a physician: "The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud." \* \* \* [Here follow quotations from various state decisions holding that a good moral character may be required as a condition of the right to practice medicine.]

But if a state may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidences of that character. We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test. *County Seat of Linn Co.*, 15 Kan. 500-528. Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the legislature as conclusive evidence thereof. It is not the province of the courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conducive to the desired result. These are questions for the legislature to determine. "The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity." *Dent v. West Virginia*, 129 U.S. 122, 9 S.Ct. 233, 32 L.Ed. 623.

It is not open to doubt that the commission of crime—the violation of the penal laws of a state—has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule, one having no relation to the subject-matter, but is only appealing to a well-recognized fact of human experience; and, if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can

there be than a conviction duly had in one of the courts of the state? The conviction is, as between the state and the defendant, an adjudication of the fact. So, if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of res judicata, and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care.

That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offenses is not conclusive. We must look at the substance, and not the form; and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the state should be deemed of such bad character as to be unfit to practice medicine, and that the record of a trial and conviction should be conclusive evidence of such violation. All that is embraced in these propositions is condensed into the single clause of the statute, and it means that, and nothing more. The state is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation of law. The former is merely the prescribed evidence of the latter. Suppose the statute had contained only a clause declaring that no one should be permitted to act as a physician who had violated the criminal laws of the state, leaving the question of violation to be determined according to the ordinary rules of evidence; would it not seem strange to hold that that which conclusively established the fact effectually relieved from the consequences of such violation?

It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform, and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist. Illustrations of this are abundant. At common law, one convicted of crime was incompetent as a witness; and this rule was in no manner affected by the lapse of time since the commission of the offense, and could not be set aside by proof of a complete reformation. So, in many states a convict is debarred the privileges of an elector, and an act so debarring was held applicable to one convicted before its passage. *Washington v. State*, 75 Ala. 582, 51 Am.Rep. 479. In

Foster v. Commissioners, 102 Cal. 483, 492, 37 P. 763, 41 Am.St. Rep. 194, the question was as to the validity of an ordinance revoking a license to sell liquor on the ground of misconduct prior to the issue of the license, and the ordinance was sustained. In commenting upon the terms of the ordinance the court said: "Though not an ex post facto law, it is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such a license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons as a class; nor can we perceive why such evidence should be more conclusive of unfitness were the act done after the passage of the ordinance than if done before."

In a certain sense such a rule is arbitrary, but it is within the power of a legislature to prescribe a rule of general application based upon a state of things which is ordinarily evidence of the ultimate fact sought to be established. "It was obviously the province of the state legislature to provide the nature and extent of the legal presumption to be deduced from a given state of facts, and the creation by law of such presumptions is, after all, but an illustration of the power to classify." Jones v. Brim, 165 U.S. 180, 183, 17 S.Ct. 282, 41 L.Ed. 677. \* \* \*

Judgment affirmed.

[HARLAN, J., gave a dissenting opinion, in which concurred PECKHAM and MCKENNA, JJ.]

#### NOTE

1. A state statute conditioning the right of a priest to pursue his calling upon his taking an oath that he had not done certain acts prior to the enactment of that statute was held to punish those acts and to be ex post facto, Cummings v. Missouri, 4 Wall. 277, 18 L.Ed. 356 (1867); and a federal statute along the same lines but applicable to the practice of law in federal courts was also held ex post facto, Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366 (1867).

2. A statute providing for the cancellation of an alien's certificate of naturalization for fraud is not ex post facto when applied to cancellation of a certificate issued prior to its enactment, Johannessen v. U. S., 225 U.S. 227, 32 S.Ct. 613, 56 L.Ed. 1066 (1911); nor is a statute permitting the deportation of an alien for acts antedating the statute, Bugajewitz v. Adams, 228 U.S. 585, 33 S.Ct. 607, 57 L.Ed. 978 (1912).

## BEAZELL v. STATE OF OHIO.

Supreme Court of the United States, 1925.  
269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216.

Mr. Justice STONE delivered the opinion of the Court.

Plaintiffs in error were jointly indicted in the court of common pleas of Hamilton county, Ohio, for the crime of embezzlement, a felony. On February 13, 1923, the date of the offense as charged, Ohio General Code, § 13677, provided:

"When two or more persons are jointly indicted for a felony, on application to the court for that purpose, each shall be tried separately."

In April of the same year, before the indictment, which was returned on October 25, this section was amended (110 Ohio Laws, p. 301) so as to provide:

"When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly, unless the court for good cause shown, on application therefor by the prosecuting attorney, or one or more of said defendants order that one or more of said defendants shall be tried separately."

By another section, the amended act was made applicable to trials for offenses committed before the amendment.

The defendants severally made motions for separate trials on the ground that their defenses would be different, that each would be prejudiced by the introduction of evidence admissible against his codefendant, but inadmissible as to him, and that they were entitled to separate trials as a matter of right, specifically charging that as applied to their own indictment and trial, "the amendment of the statutes of Ohio making the granting of said application for a separate trial discretionary with the trial court, is an ex post facto law within the restrictions imposed by article 1, § 10, of the Constitution of the United States," which provides that "no state shall \* \* \* pass any \* \* \* ex post facto law."

Both motions were denied, the joint trial and conviction of the defendants followed, and in proceedings duly had in which the constitutional question was raised, their conviction was sustained by the Supreme Court of Ohio. The case comes before this court on motions to dismiss the writs of error or to affirm the judgment below.

It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime,

after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*. The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.

But the statute of Ohio here drawn in question affects only the manner in which the trial of those jointly accused shall be conducted. It does not deprive the plaintiffs in error of any defense previously available, nor affect the criminal quality of the act charged. Nor does it change the legal definition of the offense or the punishment to be meted out. The quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, remain the same.

Expressions are to be found in earlier judicial opinions to the effect that the constitutional limitation may be transgressed by alterations in the rules of evidence or procedure. See *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648; *Cummings v. State of Missouri*, 4 Wall. 277, 326, 18 L.Ed. 356; *Kring v. Missouri*, 107 U.S. 221, 228, 232, 2 S.Ct. 443, 27 L.Ed. 506. And there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition. *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506; *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061. But it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited. A statute which, after indictment, enlarges the class of persons who may be witnesses at the trial, by removing the disqualification of persons convicted of felony, is not an *ex post facto* law. *Hopt v. Utah*, 110 U.S. 575, 4 S.Ct. 202, 28 L.Ed. 262; nor is a statute which changes the rules of evidence after the indictment so as to render admissible against the accused evidence previously held inadmissible. *Thompson v. Missouri*, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204; or which changes the place of trial, *Gut v. Minnesota*, 9 Wall. 35, 19 L.Ed. 573; or which abolishes a court for hearing criminal appeals,

creating a new one in its stead. See *Duncan v. Missouri*, 152 U.S. 377, 382, 14 S.Ct. 570, 38 L.Ed. 485.

Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see *Malloy v. South Carolina*, 237 U.S. 180, 183, 35 S.Ct. 507, 59 L.Ed. 905, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance, see *Gibson v. Mississippi*, 162 U.S. 565, 590, 16 S.Ct. 904, 40 L.Ed. 1075; *Thompson v. Missouri*, *supra*, 386, 18 S.Ct. 922; *Mallett v. North Carolina*, 181 U.S. 589, 597, 21 S.Ct. 730, 45 L.Ed. 1015.

The legislation here concerned restored a mode of trial deemed appropriate at common law, with discretionary power in the court to direct separate trials. We do not regard it as harsh or oppressive as applied to the plaintiffs in error, or as affecting any right or immunity more substantial than did the statute which changed the qualification of jurors, upheld in *Gibson v. Mississippi*, *supra*; or the statute which granted to the state an appeal from an intermediate appellate court, upheld in *Mallett v. North Carolina*, *supra*. Obviously the statute here is less burdensome to the accused than those involved in *Hopt v. Utah*, *supra*, and *Thompson v. Missouri*, *supra*.

The judgment of the Supreme Court of Ohio is  
Affirmed.

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### UNITED STATES v. MORELAND.

Supreme Court of the United States, 1922. 258 U.S. 433, 42 S.Ct. 368, 66 L.Ed. 700, 24 A.L.R. 992.

Mr. Justice McKENNA delivered the opinion of the Court.

The question in the case is what procedure, in the prosecution and conviction for crime, the Fifth Amendment of the Constitution of the United States, U.S.C.A.Const. Amend. 5, makes dependent upon the character of punishment assigned to the crime.

The amendment provides that—

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. \* \* \*

The respondent, Moreland, was proceeded against in the juvenile court of the District of Columbia by information, not by presentment or indictment by a grand jury, for the crime of willfully neglecting or refusing to provide for the support and maintenance of his minor children. The statute prescribes the punishment to be—

“a fine of not more than \$500 or by imprisonment in the workhouse of the District of Columbia at hard labor for not more than twelve months or by both such fine and imprisonment.” 34 Stat. 86.

He was tried by a jury and found guilty, and, after certain proceedings with which we have no concern, he was sentenced to the workhouse at hard labor for six months.

The Court of Appeals reversed the judgment and remanded the case to the juvenile court, with directions to dismiss the complaint. The court considered that it was constrained to decide that the judgment was in violation of the Fifth Amendment, and, therefore, to reverse it on the authority of *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140.

The United States resists both the authority and extent of that case by the citation of others, which, it asserts, modify or overrule it. A review of it, therefore, is of initial importance.

Certain statutes of the United States made it unlawful under certain circumstances for a Chinese laborer to be in the United States, and provided for his deportation by certain officers, among others, a commissioner of a United States court. And one of them (Act of 1892, 27 Stat. 25, § 4), provided that, if a Chinese person or one of that descent was “convicted and adjudged to be not lawfully entitled to be or remain in the United States,” he should “be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States.”

Wong Wing, a Chinese person (there were others arrested, but for the purpose of convenience of reference we treat the case as being against him only), was arrested and taken before a commissioner of the Circuit Court for the Eastern District of Michigan and adjudged to be unlawfully within the United States and not entitled to remain therein. It was also adjudged

that he be imprisoned at hard labor at and in the Detroit House of Correction for the period of 60 days.

The court, considering the statutes, said they operated on two classes—one which came into the country with its consent; the other which came in without consent and in disregard of law—and that Congress had the constitutional power to deport both classes and to commit the enforcement of the law to executive officers.

This power of arrest by the executive officers and the power of deportation were sustained; but the punishment provided for by the act, and which was pronounced against Wong Wing, that is, imprisonment at hard labor, was decided to be a violation of the Fifth Amendment; he not having been proceeded against by presentment or indictment by a grand jury.

The court noted the argument and the cases cited and sustained the power of exclusion, but said that when Congress went further, and inflicted punishment at hard labor, it "must provide for a judicial trial to establish the guilt of the accused." And this because such punishment was infamous and prohibited by the Fifth Amendment; the conditions prescribed by the amendment not having been observed. The necessity of their observance was decided, because, to repeat, imprisonment at hard labor was an infamous punishment. In sanction of the decision *Ex parte Wilson*, 114 U.S. 417, 428, 5 S.Ct. 935, 29 L.Ed. 89, was cited and quoted from. The citation was in point. Both propositions were presented in that case, and both were decided upon elaborate consideration and estimate of authorities. See, also, *Mackin v. United States*, 117 U.S. 348, 350, 6 S.Ct. 777, 29 L.Ed. 909.

The United States urges against the Wong Wing Case that 4 years after its decision the question of the infamy attached to punishments came up for consideration and decision in *Fitzpatrick v. United States*, 178 U.S. 304, 20 S.Ct. 944, 44 L.Ed. 1078, and that it (the Wong Wing Case) was not referred to. The immediate answer is that a case is not overruled by an omission to mention it. Besides, it was based on *Ex parte Wilson*, and that case was cited. The Wilson case was elaborate in the exposition of the law—its evolution and extent. The various punishments, or, we may say, the various imprisonments, to which infamy had been ascribed, were detailed, with citation of cases. In these were included, as certain, imprisonment in a penitentiary. But it was decided that the quality of infamy could attach to any imprisonment, if accompanied by hard labor. It was said, and it was necessary to say, in passing on Wilson's situation, that—

"Imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, 'involuntary servitude for crime,' spoken of in the provision of the Ordinance of 1787 and of the Thirteenth Amendment of the Constitution, U.S.C.A. Const. Amend. 13, by which all other slavery was abolished."

In other words, it was declared that, if imprisonment was in any other place than a penitentiary and was to be at hard labor, the latter gave it character; that is, made it infamous and brought it within the prohibition of the Constitution.

There is nothing in *Fitzpatrick v. United States* that gives aid to the contention, which counsel make, that it is the place of imprisonment—that is, imprisonment in a penitentiary—which makes the infamy; the accompaniment of hard labor being but an incident. It is true in that case it was said that "the test is not the imprisonment which is imposed, but that which may be imposed under the statute." This manifestly was said to distinguish the character of the crime as capital, and not to assign a quality to the punishment. To assign a quality to the punishment was a necessity in *Wong Wing v. United States* and in *Ex parte Wilson*, and it was responded to by discussions pertinent to it, and by decisions which were required by it. We can add nothing to the fullness of the discussions or their adequacy, and the decisions pronounced as their consequence we are not disposed to overrule. They necessarily determine, therefore, the present case, and require the affirmance of the judgment of the Court of Appeals, so far as it decides that the sentence upon Moreland was void because of the inclusion therein of the punishment of hard labor; he not having been presented or indicted by a grand jury. And because of their authority we do not review the cases cited by the United States, nor consider that they can be modified in accommodation to the practice that is said to exist of creating workhouses as places of punishment.

Some further comment becomes necessary. An attempt is made to modify the case or to remove it as authority for that at bar. The means and pains taken to accomplish it are somewhat baffling to representation. We have cited the case for the proposition that imprisonment with the accompaniment of hard labor is an infamous punishment, made so by the accompaniment of hard labor, and declared illegal because not upon presentment or indictment by a grand jury.

Doubt is cast upon our right to so cite it, and it is, in effect, asserted that the infamy of the imprisonment to which Wong Wing was sentenced was not constituted by the accompaniment of hard labor, but was the attribute of the imprisonment; the Detroit House of Correction being, it is said, a penitentiary. And

this is attempted to be established by the assertion of a fact extraneous to the opinion of the court and the record in the cause. It is true certain isolated sentences used by a justice concurring in part and dissenting in part are referred to as to what the court must have implied.

The assertion calls for reply. We have relied on the case as authority, and, regarding it as authority, we have naturally refrained from the idleness, or, as it may be said, the ostentation, of general reasoning. We might, indeed, leave the case to speak for itself to those who may need to refer to its ruling and the ruling in the present case; but some comment, though it may not be necessary, is justified.

It is to be kept in mind that the case concerned the Constitution of the United States and necessarily had a purpose beyond its incident and time. Its precept became a part of the Constitution, and in realization of this the court took care that the grounds of its decisions were neither obscure nor uncertain. Its opinion demonstrates this, and that there was no misunderstanding of the points of counsel nor ambiguity in passing upon them. What was not in controversy, of course, received no attention, and the infamy of imprisonment in a penitentiary was not in controversy; that was of universal acceptance then, as now, and an intimation of its existence would have been enough to have caused Wong Wing's delivery from custody on the instant; nor would the United States have resisted. There was in controversy, however, the question whether imprisonment in any prison or place, at hard labor, as a sentence for crime, was infamous. Upon that counsel were in opposition, and it was submitted for decision. The court contrasted the contentions.

Wong Wing's was recognized as a claim that his sentence to imprisonment at *hard labor* inflicted an infamous punishment, and hence conflicted with the Fifth and Sixth Amendments of the Constitution of the United States, U.S.C.A.Const. Amends. 5, 6, he not having been presented or indicted by a grand jury.

"On the other hand," the court said, "it is contended by the government that it has never been decided by this court that in all cases where the punishment may be confinement at hard labor, the crime is infamous, and many cases are cited from the reports of the state Supreme Courts, where the constitutionality of statutes providing for summary proceedings, without a jury trial, for the punishment by imprisonment at hard labor of vagrants and disorderly persons has been upheld.

The comment was an anticipation of some things that are urged in this case. At any rate, the contrast of contentions

shows unmistakably upon what the court's decision was invoked, and while it decided, as we have seen, that the commissioner had power under the Act of 1892 to order Wong Wing deported and to sentence him to imprisonment, Congress could not legally invest the commissioner with power to make hard labor an adjunct of the imprisonment. It was, in effect, said that the adjunct made the imprisonment infamous, and beyond the power of legislation to direct, without making provision "for a judicial trial to establish the guilt of the accused." Wong Wing was therefore discharged from custody.

That the place of imprisonment was not considered either pertinent or determinative is established by the fact that the Detroit House of Correction was not a penitentiary, nor regarded as such. It was, and is, what its name implies—a place of correction and reformation, not of condemnation to infamy, and it might be to a perpetual criminal career. Howell's Mich. Stats. Ann. (2d Ed.) c. 430, p. 5915 et seq.; Acts Mich. 1861, p. 262, Act No. 164; Compiled Laws of Mich. 1897, § 2155.

It is an institution of the city of Detroit, and the act creating it designated its use to be "for the confinement, punishment and reformation of criminals or persons sentenced thereto. \* \* \*" How this use is regulated and its purpose accomplished are detailed in too much legislation to be reproduced. The House of Correction stands in a unique relation to the state prison, and while it may, under circumstances and in the discretion of a condemning court, be a place of imprisonment for offenders that might be committed to the state prison, yet always it is kept distinct from the state prison. It does not, therefore, make its use as a place of confinement for other offenses a penitentiary, with its attachment of infamy. Its purpose is reformation, instruction in conduct, and diversion from a criminal career. To make it, therefore, a penitentiary, would defeat the purpose of its creation.

We have dwelt on this matter at length because we think more is involved than the power to deport aliens, or to punish them for illegal entry into the country—more than to deliver one from punishment who has defied the orders of a court, that enjoined upon him the manifest duty of supporting his minor children. It concerns the recognition and enforcement of a provision of the Constitution of the United States expressing and securing an important right. And the right, at times, must be accorded one whose conduct tempts to a straining of the law against him.

The ultimate contention of the United States is that the provision of the Act of March 23, 1906, for punishment by fine or imprisonment are severable, and that, therefore, it was error

in the Court of Appeals in holding the act unconstitutional, and in directing the dismissal of the case, instead of sending it back for further proceedings.

The contention is untenable. It is what sentence can be imposed under the law, not what was imposed, that is the material consideration. When an accused is in danger of an infamous punishment, if convicted, he has a right to insist that he be not put upon trial, except on the accusation of a grand jury. *Ex parte Wilson and Mackin v. United States*, *supra*.

Judgment affirmed.

Mr. Justice CLARKE took no part in the consideration and decision of this case.

Mr. Justice BRANDEIS, with whom concurs Mr. Chief Justice TAFT and Mr. Justice HOLMES, dissented.

#### NOTE

1. The provision of the Fifth Amendment, considered in the reported case, does not apply to the commencement of prosecutions in consular courts established in foreign countries, *In re Ross*, 140 U.S. 453, 11 S.Ct. 897, 35 L.Ed. 581 (1891); nor to commencing prosecutions within an unincorporated territory of the United States; *Hawaii v. Mankichi*, 190 U.S. 197, 23 S.Ct. 787, 47 L.Ed. 1016 (1903).

2. As to the meaning of the exception of cases "arising within the land or naval forces, or in the militia, when in actual service in time of war or public danger," see *Johnson v. Sayre*, 158 U.S. 109, 15 S.Ct. 773, 39 L.Ed. 914 (1895).

3. The requirement for indictment by grand jury is not violated merely because the grand jury indicting a person belonging to the Socialist party was composed of persons all belonging to other political parties, *Ruthenberg v. U. S.*, 245 U.S. 480, 39 S.Ct. 168, 62 L.Ed. 414 (1918).

4. No provision of the federal Constitution requires states to commence criminal prosecutions by indictment by a grand jury, *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884). But, if a state commences criminal prosecutions in that manner, it is prohibited by the equal protection clause of the Fourteenth Amendment from systematically and arbitrarily excluding negroes on the basis of race or color from the lists from which the grand jury is selected, or from the grand jury, in the case of a negro defendant; *Hale v. Kentucky*, 303 U.S. 613, 58 S.Ct. 753, 82 L.Ed. 1050 (1938); *Hill v. Texas*, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942); *Patton v. Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. — (1947).

## DUGAN v. OHIO.

Supreme Court of the United States, 1928. 277 U.S. 61, 48 S.Ct. 439,  
72 L.Ed. 784.

Mr. Chief Justice TAFT delivered the opinion of the Court.

M. J. Dugan was convicted before the mayor's court of the city of Xenia, Greene county, Ohio, for the unlawful possession of intoxicating liquor under section 6212—15 of the General Code of Ohio. The conviction was sustained by the common pleas court of Greene county, Ohio, by the Court of Appeals of the same county, and by the Supreme Court of the state, 117 Ohio St. 503, 159 N.E. 477. The defendant has duly raised the question of the constitutional impartiality of the mayor to try the case. This is the only issue for our consideration. The objection is based on the ground that for the mayor to act in this case was a violation of the Fourteenth Amendment to the Federal Constitution, U.S.C. A.Const. amend. 14, in that the mayor occupied in the city government two practically and seriously inconsistent positions, one partisan and the other judicial; that as such mayor he had power under the law to convict persons without a jury of the offense of the possession of intoxicating liquor and punish them by substantial fines, half of which were paid into the city treasury, and as a member of the city commission he had a right to vote on the appropriation and the spending of city funds; and further that, while he received only a fixed salary and did not receive any fees, yet all the fees taxed and collected under his convictions were paid into the city treasury, and were contributions to a general fund out of which his salary as mayor was payable.

The defendant in February, 1924, pleaded guilty and was fined \$400 for possessing intoxicating liquor, and thereafter was convicted and fined \$1,000 for a subsequent similar offense. This is a review of the second conviction.

The city of Xenia is a charter city, and has a commission form of government, with five commissioners. The charter provides that a member of the city commission shall also be mayor. The mayor has no executive, and exercises only judicial, functions. The commission exercises all the legislative power of the city, and together with the manager exercises all its executive powers. The manager is the active executive. The mayor's salary is fixed by the votes of the members of the commission other than the mayor, he having no vote therein. He receives no fees. The offense charged here was committed within the corporate limits of the city of Xenia. Xenia is the capital of Greene county, having, according to the census of 1920, a population of 9,110. Greene county is a rural county, with no larger city than Xenia.

Was the mayor disqualified as judge by the Fourteenth Amendment, as interpreted and applied in *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, 50 A.L.R. 1243? We think not. The *Tumey Case* does not apply to this. *Tumey* was arrested and charged with unlawful possession of intoxicating liquor at White Oak, a village in Hamilton county, Ohio, on a warrant issued by the mayor of North College Hill. The latter was a village of 1,100 in the county, which included the city of Cincinnati with half a million population. The counsel for the state asserted in that case that the purpose of the law in its application to the mayor of a village in large counties was to extend jurisdiction to break up places of outlawry that were located on the municipal boundary just outside of large cities; that in some of the cities the normal enforcement agencies under the law did not perform their duty, and the jurisdiction of mayors of village courts over the whole county was conferred so that there might be some courts through which effective prosecutions for city offenders could be had, and that the system by which the fines to be collected were divided equally between the state and the village was for the proper purpose of stimulating the activities of the village officers and agents to due enforcement over the county. The council of any village might by ordinance authorize the use of half of the fines collected for the violation of the prohibition law, so that by contingent commissions to attorneys, detectives or secret service officers they could secure the enforcement of the law and very much increase the revenue of the village.

The duties of the mayor of a village in Ohio like that of North College Hill were primarily executive. He was the chief conservator of the peace and directed to see that all ordinances were faithfully obeyed and enforced. He communicated to council from time to time a statement of the finances of the municipality. He supervised the conduct of all the officers of the corporation, including those engaged in prosecuting the liquor law violators.

This court in the *Tumey Case* held that it was a violation of due process of law to make the compensation of the mayor dependent upon his conviction of defendants in this especially organized "liquor" court, from which the mayor received, in addition to his salary, about \$100 a month from convictions. The direct dependence of the mayor upon convictions for compensation for his services as a judge was found to be inconsistent with due process of law.

As the plaintiff in error contends, however, the mayor's individual pecuniary interest in his conviction of defendants was not the only reason in the *Tumey Case* for holding the Fourteenth

Amendment to be violated. Another was that a defendant brought into court might with reason complain that he was not likely to get a fair trial or a fair sentence from a judge who as chief executive was responsible for the financial condition of the village, who could and did largely control the policy of setting up a liquor court in the village with attorneys, marshals, and detectives under his supervision, and who by his interest as mayor might be tempted to accumulate from heavy fines a large fund by which the running expenses of a small village could be paid, improvements might be made, and taxes reduced. This was thought not to be giving the defendant the benefit of due process of law.

No such case is presented at the bar. The mayor of Xenia receives a salary which is not dependent on whether he convicts in any case or not. While it is true that his salary is paid out of a fund to which fines accumulated from his court under all laws contribute, it is a general fund, and he receives a salary in any event, whether he convicts or acquits. There is no reason to infer on any showing that failure to convict in any case or cases would deprive him of or affect his fixed compensation. The mayor has himself as such no executive, but only judicial, duties. His relation under the Xenia charter, as one of five members of the city commission, to the fund contributed to by his fines as judge, or to the executive or financial policy of the city, is remote. We agree with the Supreme Court of Ohio in its view that the principles announced in the *Tumey Case* do not cover this.

Judgment affirmed.

#### NOTE

1. If a trial is so dominated by a mob that the jury is intimidated and the judge yields to its threats, and the state furnishes no adequate corrective processes but carries into execution the judgment based on a verdict arrived at under such conditions of mob domination, the accused is held to have been denied due process, and federal courts may interpose to protect him, *Moore v. Dempsey*, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543 (1923). Cf. *Frank v. Mangum*, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915).

2. The due process clause of the Fourteenth Amendment gives an accused a right to be present at his trial only when his presence is reasonably necessary to insure his right to an opportunity to be heard, and this right is not violated by denying him the right to be present at a view by the jury, in the presence of the judge and the accused's counsel, of the premises where the crime was alleged to have been committed; *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934). The right of an accused, on trial

in a federal court on a felony charge or a capital charge, to be present at his trial has been based on the Sixth Amendment though not specifically mentioned therein, *Diaz v. U. S.*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912).

3. The right to a public trial of a person being tried by a state is guaranteed by the due process clause of the Fourteenth Amendment. In *re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. — (1948).

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### WILLIAMS v. KAISER.

Supreme Court of the United States, 1945.  
323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398.

Mr. Justice DOUGLAS delivered the opinion of the Court.

Petitioner pleaded guilty to an indictment charging him with robbery by means of a deadly weapon. The Circuit Court of Iron County, Missouri, found him guilty and sentenced him to the state penitentiary, where he is now confined, for a term of fifteen years on May 28, 1940. In April, 1944, he filed a petition for a writ of habeas corpus in the Supreme Court of Missouri. After reciting the foregoing facts concerning his conviction he further alleges in his petition:

"Prior to his conviction and sentence, as aforesaid, the petitioner requested the aid of counsel. At the time of his conviction and sentence, as aforesaid, the petitioner was without the aid of counsel, the Court did not make an appointment of counsel, nor did petitioner waive his constitutional right to the aid of counsel, and he was incapable adequately of making his own defense, in consequence of which he was compelled to plead guilty." And he contends that he was deprived of counsel contrary to the requirements of the due process clause of the Fourteenth Amendment. The Supreme Court of Missouri allowed petitioner to proceed in forma pauperis but denied the petition for the reason that it "fails to state a cause of action." The case is here on a petition for a writ of certiorari which we granted because of the substantial nature of the constitutional question which is raised. 322 U.S. 725, 64 S.Ct. 1289.

Missouri has a statute which requires a court on request to assign counsel to a person unable to employ one and who is charged with a felony. Rev.Stat.1939, § 4003, Mo.R.S.A. The Missouri Supreme Court did not indicate the reasons for its denial of the petition beyond the statement that the petition failed to state a cause of action. Whatever the grounds of that decision it is binding on us insofar as state law is concerned. *Smith v. O'Grady*, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859. But the right to counsel

in cases of this type is a right protected by the Fourteenth Amendment of the federal Constitution. The question whether that federal right has been infringed is not foreclosed here, even though the action of the state court was on the ground that its statute requiring the appointment of counsel was not violated. *Powell v. Alabama*, 287 U.S. 45, 59, 60, 53 S.Ct. 55, 60, 61, 77 L.Ed. 158, 84 A.L.R. 527. And Missouri has not suggested in the argument before this Court that it provides a remedy other than habeas corpus for release from a confinement under a judgment of conviction obtained as a result of an unconstitutional procedure. Neither in the briefs nor in oral argument did Missouri suggest that its habeas corpus procedure (see Rev.Stat.1939, §§ 1590, 1621, 1623, Mo.R.S.A.) is not available in this situation.

The petition for habeas corpus was denied without requiring the State to answer or without giving petitioner an opportunity to prove his allegations. And the allegations contained in the petition are not inconsistent with the recitals of the certified copy of the sentence and judgment which accompanied the petition and under which petitioner is confined. Hence we must assume that the allegations of the petition are true. *Smith v. O'Grady*, *supra*. Read in that light we think the petition makes a *prima facie* showing of denial of the constitutional right. The Missouri Supreme Court has ruled that when a defendant requests counsel it will be "presumed", in absence of evidence to the contrary (*State v. Steelman*, 318 Mo. 628, 631, 300 S.W. 743), that he was "without counsel and that he lacked funds to employ them." *State v. Williams*, 320 Mo. 296, 306, 6 S.W.2d 915, 918. We indulge the same presumption. Certainly it may be reasonably inferred from that request, and from the further allegation that as a result of the court's failure to appoint counsel petitioner was "compelled to plead guilty," that he was unable to employ counsel to present his defense because he was without funds. Like other judgments, a judgment based on a plea of guilty is not of course to be lightly impeached in collateral proceedings. See *Johnson v. Zerbst*, 304 U.S. 458, 468, 469, 58 S.Ct. 1019, 1024, 1025, 82 L.Ed. 1461, 146 A.L.R. 357. But a plea of guilty to a capital offense made by one who asked for counsel but could not obtain one and who was "incapable adequately of making his own defense" stands on a different footing. Robbery in the first degree, Rev.Stat. 1939, § 4450, Mo.R.S.A. by means of a deadly weapon is a capital offense in Missouri. Rev.Stat.1939, § 4453, Mo.R.S.A. The law of Missouri has important distinctions between robbery in the first degree, robbery in the second degree, grand larceny, and petit larceny. These involve technical requirements of the indictment or information, the kind of evidence required for con-

viction, the instructions necessary to define the several elements of the crime, and the various defenses which are available. These are a closed book to the average layman. These considerations underscore what was said in *Powell v. Alabama*, supra, 287 U.S. at page 69, 53 S.Ct. at page 64, 77 L.Ed. 158, 84 A.L.R. 527: "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." Those observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial. The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused. See *Glasser v. United States*, 315 U.S. 60, 75, 76, 62 S.Ct. 457, 467, 468, 86 L.Ed. 680. Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment.

These are reasons why the right to counsel is "fundamental". *Powell v. Alabama*, supra, 287 U.S. at page 70, 53 S.Ct. at page 64, 77 L.Ed. 158, 84 A.L.R. 527; *Grosjean v. American Press Co.*, 297 U.S. 233, 243, 244, 56 S.Ct. 444, 446, 447, 80 L.Ed. 660; *Avery v. Alabama*, 308 U.S. 444, 447, 60 S.Ct. 321, 322, 84 L.Ed. 377. They indicate the protection which the individual needs when charged with crime. Prompt and expeditious detection and punishment of crime are necessary for the protection of society. But that may not be done at the expense of the civil rights of the citizen. Law enforcement need not be inefficient when accommodated to the constitutional guarantees of the individual.

*Powell v. Alabama*, supra, 287 U.S. at page 71, 55 S.Ct. at page 65, 77 L.Ed. 158, 84 A.L.R. 527, held that at least in capital offenses "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." It follows from our construction of this petition that if the allegations are taken as true, petitioner was denied due process of law. It may well be that these allegations will turn out to be specious and unfounded. But they are sufficient under the rule of *Powell v. Alabama* to establish a deprivation of due process of law if their verity is determined. See *Cochran v. Kansas*, 316 U.S. 255, 62 S.Ct. 1068, 86 L.Ed. 1453. Cf. *Walker v. Johnston*, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830.

As we have said, Missouri does not claim that habeas corpus is not available in this type of case or that under Missouri law there is some procedure other than habeas corpus available to petitioner in which he may challenge the judgment of conviction on constitutional grounds. Missouri, however, does contend that the denial of counsel could have been challenged by petitioner by an appeal, that no appeal was taken, and that no extraordinary circumstances are shown which excuse that failure. Heretofore we have not considered a failure to appeal an adequate defense to habeas corpus in this type of case. *Smith v. O'Grady*, supra. Under these circumstances the failure to appeal only emphasizes the need of counsel. If an appeal were made such a requirement, the denial of counsel would in and of itself defeat the very right which the Constitution sought to protect.

It is suggested, moreover, that for all we know the denial of the petition by the Supreme Court of Missouri rested on adequate state grounds. It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *Honeyman v. Hanan*, 300 U.S. 14, 18, 57 S.Ct. 350, 352, 81 L.Ed. 476; *Lynch v. New York*, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. \* \* \* We adhere to those decisions. But it is likewise well settled that if the independent ground was not a substantial or sufficient one, "it will be presumed that the State court based its judgment on the law

raising the Federal question, and this court will then take jurisdiction." \* \* \* Thus in *Maguire v. Tyler*, 8 Wall. 650, 19 L.Ed. 320, and in *Neilson v. Lagow*, 12 How. 98, 110, 13 L.Ed. 909, it was contended that the judgments rested on adequate state grounds. In neither was there an opinion of the state court. The Court examined the record, found the state grounds not substantial or sufficient, and reversed the judgments on the federal question. We think the principle of those cases is applicable here. The petition establishes on its face the deprivation of a federal right. The denial of the petition on the grounds that it fails to state a cause of action strongly suggests that it was denied because there was no cause of action based on the federal right. And when we search for an independent state ground to support the denial, we find none. The Attorney General of Missouri only goes so far as to say that the petition did not state facts sufficient to justify the appointment of counsel under the Missouri statute. But as we have seen, the allegations in the petition seem sufficient under the rule laid down by the Supreme Court of Missouri in *State v. Williams*, *supra*. And Missouri suggests no other state ground which might be the basis of the decision. That is to say, the only state grounds which have been advanced in support of the decision below appear to be insubstantial. We can only assume therefore that the denial by the Supreme Court of Missouri was for the reason that the petition stated no cause of action based on the federal right. That seems to us to be the fair intentment of the language which it used if we put to one side, as we must, the insubstantial state grounds which have been advanced in explanation of the denial. If perchance the Supreme Court of Missouri meant that some reason of state law precludes a decision of the federal question, that question is not foreclosed by this decision. Cf. *State Tax Commission v. Van Cott*, 306 U.S. 511, 59 S.Ct. 605, 83 L.Ed. 950; *State of Minnesota v. National Tea Co.*, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920. But on the present state of the record before us, we do not see what more petitioner need do to establish the federal right on which his petition is based.

Reversed.

Mr. Justice FRANKFURTER dissented in an opinion joined in by Justice ROBERTS.

#### NOTE

1. The extent to which the due process clause of the Fourteenth Amendment requires an accused to be furnished counsel was considered specifically by the Supreme Court for the first time in *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 178 (1932). Since that decision there have been numerous decisions concerned with

delimiting the extent of the right to counsel. The following are among the more important of them: *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1939); *Smith v. O'Grady*, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859 (1941); *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942); *Rice v. Olson*, 324 U.S. 786, 65 S.Ct. 989, 89 L.Ed. 1367 (1945); *Canizio v. New York*, 327 U.S. 82, 66 S.Ct. 33, 90 L.Ed. 416 (1946); *Carter v. Illinois*, 329 U.S. 173, 67 S.Ct. 216, 91 L.Ed. 172 (1946); *Foster v. Illinois*, 332 U.S. 134, 67 S.Ct. 1716, 91 L.Ed. 1955 (1947); *Butz v. People of Illinois*, 333 U.S. 640, 68 S.Ct. 763, 92 L.Ed. — (1948); *Townsend v. Burke*, — U.S. —, 68 S.Ct. 1252, 92 L.Ed. — (1948); cf. with last case *Gryger v. Burke*, — U.S. —, 68 S.Ct. 1256, 92 L.Ed. — (1948). See Note, *The Right to Benefit of Counsel under the Federal Constitution*, 42 Col.L.Rev. 271 (1942); Note, *Some Recent Supreme Court Decisions on the Right to Counsel under the Fourteenth Amendment*, 33 Va.L.Rev. 731 (1947). For discussion of procedural problems in enforcing this and other constitutional protections of an accused, see A. Holtzoff, *Collateral Review of Convictions*, 25 Boston U.L.Rev. 26 (1945).

2. The Sixth Amendment confers upon an accused the right to have the assistance of counsel in all criminal prosecutions; for cases construing this provision, see *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Glasser v. U. S.*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

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### BROWN v. MISSISSIPPI.

Supreme Court of the United States, 1936. 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

The question in this case is whether convictions, which rest solely upon confessions shown to have been extorted by officers of the state by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States. U.S.C.A.Const. Amend. 14.

Petitioners were indicted for the murder of one Raymond Stewart, whose death occurred on March 30, 1934. They were indicted on April 4, 1934, and were then arraigned and pleaded not guilty. Counsel were appointed by the court to defend them. Trial was begun the next morning and was concluded on the following day, when they were found guilty and sentenced to death.

Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury. After a preliminary inquiry, testimony as to the confessions was received over the objection of defendants' counsel. Defendants then testified that the confessions were false and had been procured by

physical torture. The case went to the jury with instructions, upon the request of defendants' counsel, that if the jury had reasonable doubt as to the confessions having resulted from coercion, and that they were not true, they were not to be considered as evidence. On their appeal to the Supreme Court of the State, defendants assigned as error the inadmissibility of the confessions. The judgment was affirmed. 173 Miss. 542, 158 So. 339.

Defendants then moved in the Supreme Court of the State to arrest the judgment and for a new trial on the ground that all the evidence against them was obtained by coercion and brutality known to the court and to the district attorney, and that defendants had been denied the benefit of counsel or opportunity to confer with counsel in a reasonable manner. The motion was supported by affidavits. At about the same time, defendants filed in the Supreme Court a "suggestion of error" explicitly challenging the proceedings of the trial, in the use of the confessions and with respect to the alleged denial of representation by counsel, as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States. The state court entertained the suggestion of error, considered the federal question, and decided it against defendants' contentions. 173 Miss. 542, 161 So. 465. Two judges dissented. 161 So. 470. We granted a writ of certiorari. 296 U.S. 559, 56 S.Ct. 128, 80 L.Ed. 394.

The grounds of the decision were (1) that immunity from self-incrimination is not essential to due process of law; and (2) that the failure of the trial court to exclude the confessions after the introduction of evidence showing their incompetency, in the absence of a request for such exclusion, did not deprive the defendants of life or liberty without due process of law; and that even if the trial court had erroneously overruled a motion to exclude the confessions, the ruling would have been mere error reversible on appeal, but not a violation of constitutional right.

\* \* \*

1. The state stresses the statement in *Twining v. New Jersey*, 211 U.S. 78, 114, 29 S.Ct. 14, 26, 53 L.Ed. 97, that "exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution," and the statement in *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674, 90 A.L.R. 575, that "the privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state." But the question of the right of the state to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify.

Compulsion by torture to extort a confession is a different matter.

The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, *supra*; *Rogers v. Peck*, 199 U.S. 425, 434, 26 S.Ct. 87, 50 L.Ed. 256. The state may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. *Walker v. Sauvinet*, 92 U.S. 90, 23 L.Ed. 678; *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111, 292, 28 L.Ed. 232; *Snyder v. Massachusetts*, *supra*. But the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The state may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. *Moore v. Dempsey*, 261 U.S. 86, 91, 43 S.Ct. 265, 67 L.Ed. 543. The state may not deny to the accused the aid of counsel. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527. Nor may a state, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is "but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791, 98 A.L.R. 406. And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert v. Louisiana*, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270, 48 A.L.R. 1102. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

2. It is in this view that the further contention of the State must be considered. That contention rests upon the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been

introduced and the fact of coercion had been proved. It is a contention which proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. *Moore v. Dempsey*, supra. We are not concerned with a mere question of state practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient. In an earlier case the Supreme Court of the State had recognized the duty of the court to supply corrective process where due process of law had been denied. In *Fisher v. State*, 145 Miss. 116, 134, 110 So. 361, 365, the court said: "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The Constitution recognized the evils that lay behind these practices and prohibited them in this country. \* \* \*

The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective."

In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. *Mooney v. Holohan*, supra. It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. The court thus denied a federal right fully established and specially set up and claimed, and the judgment must be reversed.

It is so ordered.

#### NOTE

1. The principle of the reported case has been affirmed and applied in many subsequent decisions. The decisions usually turn on an interpretation of the facts of the specific case; see *Lisenba v. California*, 314 U.S. 219, 52 S.Ct. 281, 86 L.Ed. 166 (1941); *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944); *Ash-*

craft v. Tennessee, 327 U.S. 274, 66 S.Ct. 544, 90 L.Ed. 667 (1946) (same case as the previous case after a retrial in the state courts); Haley v. State, 332 U.S. 742, 68 S.Ct. 302, 92 L.Ed. — (1948) (good example of effect upon decision of this type of case of attitudes of the members of the Court). A defendant was held not to lose his right to contend that an oral confession was coerced because he had testified that he had never made a confession, Lee v. Mississippi, 332 U.S. 742, 68 S.Ct. 300, 92 L.Ed. — (1948).

2. Due process is denied a person whose conviction is based solely on perjured testimony known by the prosecutor to be such, Moon-ey v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935).

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### HARRIS v. UNITED STATES.

Supreme Court of the United States, 1947.  
331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399.

Mr. Chief Justice VINSON delivered the opinion of the Court.

Petitioner was convicted on sixteen counts of an indictment charging the unlawful possession, concealment and alteration of certain Notice of Classification Cards and Registration Certificates in violation of § 11 of the Selective Training and Service Act of 1940, and of § 48 of the Criminal Code. Prior to the trial, petitioner moved to suppress the evidence, which served as the basis for the conviction, on the grounds that it had been obtained by means of an unreasonable search and seizure contrary to the provisions of the Fourth Amendment and that to permit the introduction of that evidence would be to violate the self-incrimination clause of the Fifth Amendment. The motion to suppress was denied, and petitioner's numerous objections to the evidence at the trial were overruled. The Circuit Court of Appeals affirmed the conviction. 10 Cir., 151 F.2d 837. Certiorari was granted because of the importance of the questions presented. 66 S.Ct. 1360.

Two valid warrants of arrest were issued. One charged that petitioner and one Moffett had violated the Mail Fraud Statute by causing a letter addressed to the Guaranty Trust Company of New York to be placed in the mails for the purpose of cashing a forged check for \$25,000 drawn on the Mudge Oil Company in pursuance of a scheme to defraud. The second warrant charged that petitioner and Moffett, with intent to defraud certain banks and the Mudge Oil Company, had caused a \$25,000 forged check to be transported in interstate commerce, in violation of § 3 of the National Stolen Property Act.

Five agents of the Federal Bureau of Investigation, acting under the authority of the two warrants, went to the apartment of petitioner in Oklahoma City and there arrested him. The apartment consisted of a living room, bedroom, bathroom and kitchen. Following the arrest, which took place in the living room, petitioner was handcuffed and a search of the entire apartment was undertaken. The agents stated that the object of the search was to find two \$10,000 canceled checks of the Mudge Oil Company which had been stolen from that company's office and which were thought to have been used in effecting the forgery. There was evidence connecting petitioner with that theft. In addition, the search was said to be for the purpose of locating "any means that might be used to commit these two crimes, such as burglary tools, pens, or anything that could be used in a confidence game of this type."

One agent was assigned to each room of the apartment and, over petitioner's protest, a careful and thorough search proceeded for approximately five hours. As the search neared its end, one of the agents discovered in a bedroom bureau drawer a sealed envelope marked "George Harris, personal papers." The envelope was torn open and on the inside a smaller envelope was found containing eight Notice of Classification cards and 11 Registration Certificates bearing the stamp of Local Board No. 7 of Oklahoma County. It was this evidence upon which the conviction in the District Court was based and against which the motion to suppress was directed. It is conceded that the evidence is in no way related to the crimes for which petitioner was initially arrested and that the search which led to its discovery was not conducted under the authority of a search warrant.

In denying the motion to suppress the District Court wrote no opinion. The Circuit Court of Appeals affirmed the conviction, finding that the search was carried on in good faith by the federal agents for the purposes expressed, that it was not a general exploratory search for merely evidentiary materials, and that the search and seizure were a reasonable incident to petitioner's arrest.

If it is true, as petitioner contends, that the draft cards were seized in violation of petitioner's rights under the Fourth Amendment, the conviction based upon evidence so obtained cannot be sustained. *Boyd v. United States*, 1886, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746; *Weeks v. United States*, 1914, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, L.R.A.1915B, 834, Ann.Cas.1915C, 1177; *Ag-nello v. United States*, 1925, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145;

*Seguro v. United States*, 1927, 275 U.S. 106, 48 S.Ct. 77, 72 L.Ed. 186. This Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment “\* \* \* are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen \* \* \*”. *Gould v. United States*, 1921, 255 U.S. 298, 304, 41 S.Ct. 261, 263, 65 L.Ed. 647.

This Court has also pointed out that it is only unreasonable searches and seizures which come within the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms. “Each case is to be decided on its own facts and circumstances.” *Go-Bart Importing Company v. United States*, 1931, 282 U.S. 344, 357, 51 S.Ct. 153, 158, 75 L.Ed. 374.

The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states.

The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control. Thus in *Agnello v. United States*, supra, 269 U.S. at page 30, 46 S.Ct. at page 5, 70 L.Ed. 145, it was said: “The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted.” It is equally clear that a search incident to arrest, which is otherwise reasonable, is not automatically rendered invalid by the fact that a dwelling place, as contrasted to a business premises, is subjected to search.

Nor can support be found for the suggestion that the search could not validly extend beyond the room in which petitioner was arrested. Petitioner was in exclusive possession of a four room apartment. His control extended quite as much to the bedroom in which the draft cards were found as to the living room in which he was arrested. The canceled checks and other instrumentalities of the crimes charged in the warrants could easily have been concealed in any of the four rooms of the apartment. Other

situations may arise in which the nature and size of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive. But the area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment.

Similar considerations are applicable in evaluating petitioner's contention that the search was, in any event, too intensive. Here again we must look to the particular circumstances of the particular case. As was observed by the Circuit Court of Appeals [151 F.2d 837, 840]: "It is not likely that the checks would be visibly accessible. By their very nature they would have been kept in some secluded spot \* \* \*." The same meticulous investigation which would be appropriate in a search for two small canceled checks could not be considered reasonable where agents are seeking a stolen automobile or an illegal still. We do not believe that the search in this case went beyond that which the situation reasonably demanded.

This is not a case in which law enforcement officials have invaded a private dwelling without authority and seized evidence of crime. *Amos v. United States*, 1921, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654; *Byars v. United States*, 1927, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520; *Nueslein v. District of Columbia*, 1940, 73 App. D.C. 85, 115 F.2d 690. Here the agents entered the apartment under the authority of lawful warrants of arrest. Neither was the entry tortious nor was the arrest which followed in any sense illegal.

Nor is this a case in which law enforcement officers have entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime. *Go-Bart Company v. United States*, supra; *Lefkowitz v. United States*, supra. In the present case the agents were in possession of facts indicating petitioner's probable guilt of the crimes for which the warrants of arrest were issued. The search was not a general exploration but was specifically directed to the means and instrumentalities by which the crimes charged had been committed, particularly the two canceled checks of the Mudge Oil Company. The Circuit Court of Appeals found and the District Court acted on the assumption that the agents conducted their search in good faith for the purpose of discovering the objects specified. That determination is supported by the record. The two canceled checks were stolen from the offices of the Mudge Oil Company. There was evidence

connecting petitioner with that theft. The search which followed the arrest was appropriate for the discovery of such objects. Nothing in the agents' conduct was inconsistent with their declared purpose.

Furthermore, the objects sought for and those actually discovered were properly subject to seizure. This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime. Clearly the checks and other means and instrumentalities of the crimes charged in the warrants toward which the search was directed as well as the draft cards which were in fact seized fall within that class of objects properly subject to seizure. Certainly this is not a case of search for or seizure of an individual's private papers, nor does it involve a prosecution based upon the expression of political or religious views in such papers.

Nor is it a significant consideration that the draft cards which were seized were not related to the crimes for which petitioner was arrested. Here during the course of a valid search the agents came upon property of the United States in the illegal custody of the petitioner. It was property to which the Government was entitled to possession. In keeping the draft cards in his custody petitioner was guilty of a serious and continuing offense against the laws of the United States. A crime was thus being committed in the very presence of the agents conducting the search. Nothing in the decisions of this Court gives support to the suggestion that under such circumstances the law-enforcement officials must impotently stand aside and refrain from seizing such contraband material. If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated.

The dangers to fundamental personal rights and interests resulting from excesses of law-enforcement officials committed during the course of criminal investigations are not illusory. This Court has always been alert to protect against such abuse. But we should not permit our knowledge that abuses sometimes

occur to give sinister coloration to procedures which are basically reasonable. We conclude that in this case the evidence which formed the basis of petitioner's conviction was obtained without violation of petitioner's rights under the Constitution.

Affirmed.

Messrs. Justices FRANKFURTER, MURPHY, RUTLEDGE, and JACKSON dissented.

### NOTE

1. The extent to which a search incident to a lawful arrest includes a right to search the premises of the person arrested is also considered in *Agnello v. U. S.*, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925); *Marron v. U. S.*, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927). A search without warrant that disclosed facts on which an arrest without a warrant would have been justified cannot validate the search as one incident to a lawful arrest where the officers making the search would not have had a valid basis for an arrest without warrant prior to the search, *Johnson v. U. S.*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. — (1948).

A seizure without warrant of contraband open to view at time of arrest for a felony being committed in the officers' presence has been held to violate the Fourth Amendment where the officers had had ample time to procure a warrant prior to the arrest. *Trapiano v. U. S.*, — U.S. —, 68 S.Ct. 1229, 92 L.Ed. — (1948).

2. The secret extraction of one's papers by a federal officer from one's office while said officer purported to be making an ordinary business call has been held an unreasonable search, *Gouled v. U. S.*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921); as is a search of a person's room without his consent during his absence, admittance having been obtained by use of a key whose location had been disclosed to the officers by a neighbor, *Weeks v. U. S.*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).

3. In *Carroll v. U. S.*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Court sustained a search without a warrant of an automobile where the officer making it had reasonable or probable cause to believe that it contained contraband goods being illegally transported. In a recent case, *U. S. v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. — (1948), the Court held that that principle would not confer an incidental right to search a person seated in such vehicle where there existed no reasonable grounds for connecting him with the illegal transaction occurring in the car. Note Justice Jackson's explanation of the *Carroll* Case in his opinion in the *Di Re* Case.

4. For a discussion of the effect of consent to the search, and what amounts to consent, see *Davis v. U. S.*, 328 U.S. 582, 66 S.Ct. 1256, 90 L.Ed. 1453 (1946); *Zap v. U. S.*, 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946).

5. The tapping of a person's telephone wires by federal officers does not constitute an unreasonable search, and the use of evidence so obtained is not in violation of the Fifth Amendment's

prohibition against compulsory self-incrimination, *Olmstead v. U. S.*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928). The same decision was recently rendered with respect to evidence obtained by a dictaphone applied to defendant's office wall, *Goldman v. U. S.*, 316 U.S. 114, 62 S.Ct. 993, 86 L.Ed. 1312 (1942).

6. The federal government may not use evidence against a person which has been obtained by an unlawful search conducted by state officers acting for, or in co-operation with agents of the federal government; *Byars v. U. S.*, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927); *Gambino v. U. S.*, 275 U.S. 310, 48 S.Ct. 137, 72 L.Ed. 293 (1927).

7. The subject of the relation between the Fourth Amendment prohibiting unreasonable searches and seizures and the Fifth Amendment provision against compulsory self-incrimination is discussed in the following articles: R. J. Smith, *The Supreme Court and Unreasonable Searches*, 38 Yale L. Jour. 77 (1928); T. E. Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 Col.L.Rev. 11 (1925); R. J. Smith, *The Meaning of the Federal Rule on Evidence Illegally Obtained*, 36 Yale L.Jour. 536 (1927).

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### ADAMSON v. PEOPLE OF CALIFORNIA.

Supreme Court of the United States, 1947.  
332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903.

Mr. Justice REED delivered the opinion of the Court.

The appellant, Adamson, a citizen of the United States, was convicted, without recommendation for mercy, by a jury in a Superior Court of the State of California of murder in the first degree. After considering the same objections to the conviction that are pressed here, the sentence of death was affirmed by the Supreme Court of the state. 27 Cal.2d 478, 165 P.2d 3. Review of that judgment by this Court was sought and allowed under Judicial Code § 237, 28 U.S.C. § 344, 28 U.S.C.A. § 344. The provisions of California law which were challenged in the state proceedings as invalid under the Fourteenth Amendment to the Federal Constitution are those of the state constitution and penal code in the margin. They permit the failure of a defendant to explain or to deny evidence against him to be commented upon by court and by counsel and to be considered by court and jury. The defendant did not testify. As the trial court gave its instructions and the District Attorney argued the case in accordance with the constitutional and statutory provisions just referred to, we have for decision the question of their constitutionality in these circumstances under the limitations of § 1 of the Fourteenth Amendment.

The appellant was charged in the information with former convictions for burglary, larceny and robbery and pursuant to § 1025, California Penal Code, answered that he had suffered the previous convictions. This answer barred allusion to these charges of convictions on the trial. Under California's interpretation of § 1025 of the Penal Code and § 2051 of the Code of Civil Procedure, however, if the defendant, after answering affirmatively charges alleging prior convictions, takes the witness stand to deny or explain away other evidence that has been introduced "the commission of these crimes could have been revealed to the jury on cross-examination to impeach his testimony." *People v. Adamson*, 27 Cal.2d 478, 494, 165 P.2d 3, 11; *People v. Braun*, 14 Cal.2d 1, 6, 92 P.2d 402. This forces an accused who is a repeated offender to choose between the risk of having his prior offenses disclosed to the jury or of having it draw harmful inferences from uncontradicted evidence that can only be denied or explained by the defendant.

In the first place, appellant urges that the provision of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" is a fundamental national privilege or immunity protected against state abridgment by the Fourteenth Amendment or a privilege or immunity secured, through the Fourteenth Amendment, against deprivation by state action because it is a personal right, enumerated in the federal Bill of Rights.

Secondly, appellant relies upon the due process of law clause of the Fourteenth Amendment to invalidate the provisions of the California law (a) because comment on failure to testify is permitted, (b) because appellant was forced to forego testimony in person because of danger of disclosure of his past convictions through cross-examination and (c) because the presumption of innocence was infringed by the shifting of the burden of proof to appellant in permitting comment on his failure to testify.

We shall assume, but without any intention thereby of ruling upon the issue, that state permission by law to the court, counsel and jury to comment upon and consider the failure of defendant "to explain or to deny by his testimony any evidence or facts in the case against him" would infringe defendant's privilege against self-incrimination under the Fifth Amendment if this were a trial in a court of the United States under a similar law. Such an assumption does not determine appellant's rights under the Fourteenth Amendment. It is settled law that the clause of the Fifth Amendment, protecting a person against being

compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights.

The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states. *Barron v. Baltimore*, 7 Pet. 243, 8 L.Ed. 672; *Feldman v. United States*, 322 U.S. 487, 490, 64 S.Ct. 1082, 1283, 88 L.Ed. 1408, 154 A.L.R. 982. With the adoption of the Fourteenth Amendment, it was suggested that the dual citizenship recognized by its first sentence, secured for citizens federal protection for their elemental privileges and immunities of state citizenship. The *Slaughter-House Cases* decided, contrary to the suggestion, that these rights, as privileges and immunities of state citizenship, remained under the sole protection of the state governments. This Court, without the expression of a contrary view upon that phase of the issues before the Court, has approved this determination. *Maxwell v. Bugbee*, 250 U.S. 525, 537, 40 S.Ct. 2, 5, 63 L.Ed. 1124; *Hamilton v. Regents*, 293 U.S. 245, 261, 55 S.Ct. 197, 203, 79 L.Ed. 343. The power to free defendants in state trials from self-incrimination was specifically determined to be beyond the scope of the privileges and immunities clause of the Fourteenth Amendment in *Twining v. New Jersey*, 211 U.S. 78, 91-98, 29 S.Ct. 14, 16-19, 53 L.Ed. 97. "The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state." The *Twining* case likewise disposed of the contention that freedom from testimonial compulsion, being specifically granted by the Bill of Rights, is a federal privilege or immunity that is protected by the Fourteenth Amendment against state invasion. This Court held that the inclusion in the Bill of Rights of this protection against the power of the national government did not make the privilege a federal privilege or immunity secured to citizens by the Constitution against state action. *Twining v. New Jersey*, *supra*, 211 U.S. at pages 98, 99, 29 S.Ct. at page 19, 53 L.Ed. 97; *Palko v. Connecticut*, *supra*, 302 U.S. at page 328, 58 S.Ct. at page 153, 82 L.Ed. 288. After declaring that state and national citizenship co-exist in the same person, the Fourteenth Amendment forbids a state from abridging the privileges and immunities of citizens of the United States. As a matter of words, this leaves a state free to abridge within the limits of

the due process clause, the privileges and immunities flowing from state citizenship. This reading of the Federal Constitution has heretofore found favor with the majority of this Court as a natural and logical interpretation. It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship. It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment. This construction has become embedded in our federal system as a functioning element in preserving the balance between national and state power. We reaffirm the conclusion of the *Twining* and *Palko* cases that protection against self-incrimination is not a privilege or immunity of national citizenship.

Appellant secondly contends that if the privilege against self-incrimination is not a right protected by the privileges and immunities clause of the Fourteenth Amendment against state action, this privilege, to its full scope under the Fifth Amendment, inheres in the right to a fair trial. A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment. Therefore, appellant argues, the due process clause of the Fourteenth Amendment protects his privilege against self-incrimination. The due process clause of the Fourteenth Amendment, however, does not draw all the rights of the federal Bill of Rights under its protection. That contention was made and rejected in *Palko v. Connecticut*, 302 U. S. 319, 323, 58 S.Ct. 149, 150, 82 L.Ed. 288. It was rejected with citation of the cases excluding several of the rights, protected by the Bill of Rights, against infringement by the National Government. Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution. *Palko* held that such provisions of the Bill of Rights as were "implicit in the concept of ordered liberty," 302 U.S. at page 325, 58 S.Ct. at pages 151, 152, became secure from state interference by the clause. But it held nothing more.

Specifically, the due process clause does not protect by virtue of its mere existence the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment. *Twining v. New Jersey*, 211 U.S. 78, 99-114, 29 S.Ct. 14, 19-26, 53 L.Ed. 97; *Palko v. Connecticut*, *supra*, 302 U.S. at page 323, 58 S.Ct. at page 150, 82 L.Ed. 288. For a state to require testimony from

an accused is not necessarily a breach of a state's obligation to give a fair trial. Therefore, we must examine the effect of the California law applied in this trial to see whether the comment on failure to testify violates the protection against state action that the due process clause does grant to an accused. The due process clause forbids compulsion to testify by fear of hurt, torture or exhaustion. It forbids any other type of coercion that falls within the scope of due process. California follows Anglo-American legal tradition in excusing defendants in criminal prosecutions from compulsory testimony. Cf. Wigmore (3d Ed.) § 2252. That is a matter of legal policy and not because of the requirements of due process under the Fourteenth Amendment. So our inquiry is directed, not at the broad question of the constitutionality of compulsory testimony from the accused under the due process clause, but to the constitutionality of the provision of the California law that permits comment upon his failure to testify. It is, of course, logically possible that while an accused might be required, under appropriate penalties, to submit himself as a witness without a violation of due process, comment by judge or jury on inferences to be drawn from his failure to testify, in jurisdictions where an accused's privilege against self-incrimination is protected, might deny due process. For example, a statute might declare that a permitted refusal to testify would compel an acceptance of the truth of the prosecution's evidence.

Generally, comment on the failure of an accused to testify is forbidden in American jurisdictions. This arises from state constitutional or statutory provisions similar in character to the federal provisions. Fifth Amendment and 28 U.S.C. § 632, 28 U.S.C.A. § 632. California, however, is one of a few states that permit limited comment upon a defendant's failure to testify. That permission is narrow. The California law is set out in note 3 and authorizes comment by court and counsel upon the "failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him." This does not involve any presumption, rebuttable or irrebuttable, either of guilt or of the truth of any fact, that is offered in evidence. Compare *Tot v. United States*, 319 U.S. 463, 470, 63 S.Ct. 1241, 1246, 87 L.Ed. 1519. It allows inferences to be drawn from proven facts. Because of this clause, the court can direct the jury's attention to whatever evidence there may be that a defendant could deny and the prosecution can argue as to inferences that may be drawn from the accused's failure to testify. Compare *Caminetti v. United States*, 242 U.S. 470, 492-495, 37 S.Ct. 192, 197, 198, 61 L.Ed. 442, L.R.A.1917F, 502, Ann.Cas.1917B, 1168;

Raffel v. United States, 271 U.S. 494, 497, 46 S.Ct. 566, 567, 70 L.Ed. 1054. There is here no lack of power in the trial court to adjudge and no denial of a hearing. California has prescribed a method for advising the jury in the search for truth. However sound may be the legislative conclusion that an accused should not be compelled in any criminal case to be a witness against himself, we see no reason why comment should not be made upon his silence. It seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon defendant's failure to explain or deny it. The prosecution evidence may be of facts that may be beyond the knowledge of the accused. If so, his failure to testify would have little if any weight. But the facts may be such as are necessarily in the knowledge of the accused. In that case a failure to explain would point to an inability to explain.

Appellant sets out the circumstances of this case, however, to show coercion and unfairness in permitting comment. The guilty person was not seen at the place and time of the crime. There was evidence, however, that entrance to the place or room where the crime was committed might have been obtained through a small door. It was freshly broken. Evidence showed that six fingerprints on the door were petitioner's. Certain diamond rings were missing from the deceased's possession. There was evidence that appellant, some time after the crime, asked an unidentified person whether the latter would be interested in purchasing a diamond ring. As has been stated, the information charged other crimes to appellant and he admitted them. His argument here is that he could not take the stand to deny the evidence against him because he would be subjected to a cross-examination as to former crimes to impeach his veracity and the evidence so produced might well bring about his conviction. Such cross-examination is allowable in California. *People v. Adamson*, supra, 27 Cal.2d 494, 165 P.2d 3. Therefore, appellant contends the California statute permitting comment denies him due process.

It is true that if comment were forbidden, an accused in this situation could remain silent and avoid evidence of former crimes and comment upon his failure to testify. We are of the view, however, that a state may control such a situation in accordance with its own ideas of the most efficient administration of criminal justice. The purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction. When evidence is before a jury that threatens

conviction, it does not seem unfair to require him to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes. Indeed, this is a dilemma with which any defendant may be faced. If facts, adverse to the defendant, are proven by the prosecution, there may be no way to explain them favorably to the accused except by a witness who may be vulnerable to impeachment on cross-examination. The defendant must then decide whether or not to use such a witness. The fact that the witness may also be the defendant makes the choice more difficult but a denial of due process does not emerge from the circumstances.

There is no basis in the California law for appellant's objection on due process or other grounds that the statutory authorization to comment on the failure to explain or deny adverse testimony shifts the burden of proof or the duty to go forward with the evidence. Failure of the accused to testify is not an admission of the truth of the adverse evidence. Instructions told the jury that the burden of proof remained upon the state and the presumption of innocence with the accused. Comment on failure to deny proven facts does not in California tend to supply any missing element of proof of guilt. *People v. Adamson*, supra, 27 Cal.2d 489-495, 165 P.2d 3. It only directs attention to the strength of the evidence for the prosecution or to the weakness of that for the defense. The Supreme Court of California called attention to the fact that the prosecutor's argument approached the borderline in a statement that might have been construed as asserting "that the jury should infer guilt solely from defendant's silence." That court felt that it was improbable the jury was misled into such an understanding of their power. We shall not interfere with such a conclusion. *People v. Adamson*, supra, 27 Cal.2d 494, 495, 165 P.2d 3, 12.

Finally, appellant contends that due process of law was denied him by the introduction as evidence of tops of women's stockings that were found in his room. The claim is made that such evidence inflamed the jury. The lower part of a woman's stocking was found under the victim's body. The top was not found. The corpse was barelegged. The tops from defendant's room did not match the lower part found under the dead body. The California court held that the tops were admissible as evidence because this "interest in women's stocking tops is a circumstance that tends to identify defendant" as the perpetrator of the crime. We do not think the introduction of this evidence violated any federal constitutional right.

We find no other error that gives ground for our intervention in California's administration of criminal justice.

Affirmed.

Mr. Justice FRANKFURTER concurred in a separate opinion. Justice MURPHY dissented in an opinion concurred in by Justice RUTLEDGE. Justice BLACK dissented in an opinion joined in by Justice Douglas.

#### NOTE

1. Cf. with the reported case *Johnson v. U. S.*, 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704 (1943).
2. A statute that provided that the unexplained failure to produce documents in response to a court order should be taken as a confession of the allegations contained in the motion on which the order was based was held invalid as a violation of the privilege against self-incrimination as applied to a case in which the order constituted a violation of the privilege against unreasonable searches and seizures; *Boyd v. U. S.*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886).
3. The privilege against self-incrimination may not be invoked by a corporation, *Wilson v. U. S.*, 201 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911). An official of a labor union may not invoke it on his own behalf to avoid producing union documents and records alleged to incriminate him, *U. S. v. White*, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944).
4. As to the principles determining the validity, and the effect, of immunity statutes, see *Counselman v. Hitchcock*, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892); *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896); *U. S. v. Murdock*, 284 U.S. 141, 52 S.Ct. 63, 76 L.Ed. 210 (1931).
5. It has recently been held that a person's privilege against self-incrimination under the Fifth Amendment is not violated by permitting the use in evidence against him of testimony given by him in state proceedings in which he had been compelled to testify as to those matters; *Feldman v. U. S.*, 322 U.S. 487, 64 S.Ct. 1082, 88 L.Ed. 1408 (1944), in which Justices Black, Rutledge and Douglas dissented.
6. The due process clause of the Fifth Amendment limits Congress in creating presumptions that regulate the burden of proof or operate as evidence. These limits are discussed in *Yee Hem v. U. S.*, 268 U.S. 178, 45 S.Ct. 470, 69 L.Ed. 904 (1925), and *Tot v. U. S.*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943). The due process clause of the Fourteenth Amendment limits state legislatures in the same general manner; *Morrison v. California*, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664 (1934). See W. P. Keeton, *Statutory Presumptions, Their Constitutionality and Legal Effect*, 10 *Tex.L.Rev.* 34 (1931); P. W. Brosman, *The Statutory Presumption*, 5 *Tulane L.Rev.* 17 (1930).

7. See on the general problems of compulsory self-incrimination, E. S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 20 Mich.L.Rev. 1, 191 (1930); Comment, *Constitutional Law—Due Process and the Bill of Rights—Self-Incrimination*, 46 Mich.L.Rev. 372 (1948); Note, *Waiver of Privilege against Self-Incrimination by Public Officers*, 30 Col.L.Rev. 1160 (1930); Note, *The Privilege against Self-Incrimination and the Scope of Statutory Immunity*, 41 Yale L.Jour. 618 (1932); J. A. C. Grant, *Immunity from Compulsory Self-Incrimination in a Federal System of Government*, 9 Temple L.Quar. 57, 194 (1935).

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## FAY v. PEOPLE OF STATE OF NEW YORK.

Supreme Court of the United States, 1947.  
332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043.

Mr. Justice JACKSON delivered the opinion of the Court.

These cases present the same issue, a challenge to the constitutionality of the special or so-called "blue ribbon" jury as used by state courts in the State and County of New York.

Such a jury found Fay and Bove guilty of conspiracy to extort and of extortion. Bove was Vice-President of the International Hod Carriers, Building and Common Laborers' Union of America. Fay was Vice-President of the International Union of Operating Engineers. The City of New York awarded contracts for construction of an extensive project known as the Delaware Water Supply system to several large construction concerns. It was not denied that Fay and Bove collected from these contractors upwards of \$300,000. But it was denied that payment was induced by threats to do unlawful injury to person or property. The defense claimed that the payments were voluntary—bribes, perhaps, but not extortion—that these men were paid merely for undertaking to assist the contractors to avoid labor trouble, to prevent jurisdictional or unauthorized strikes, and to "handle the labor situation," and that Fay and Bove rendered service as agreed.

The indictment charged the crimes in seven counts. One was dismissed by the court; the remaining six were submitted to the jury. The jury acquitted the defendants on three of the counts, disagreed on another, and convicted on two counts. The convictions were affirmed on appeal by the Appellate Division of the Supreme Court, which reviews both law and fact, and by the Court of Appeals. No federal question is raised as to the merits of the finding of guilt and we are to assume that the convictions were warranted by the evidence and, except for questions as to the special jury, were regular. While there was challenge to the panel from which this jury was drawn, on ground of

denial of federal due process and equal protection, each individual juror was accepted by the defendants without challenge for cause. The challenge to the special jury panel was not discussed by either of the appellate courts of the State but the federal questions were sufficiently and timely raised throughout and were overruled by all state courts. A dual system of juries presents easy possibilities of violation of the Fourteenth Amendment and we took these cases by certiorari to examine the charges of unconstitutionality. 329 U.S. 697, 67 S.Ct. 92.

The question is whether a warranted conviction by a jury individually accepted as fair and unbiased should be set aside on the ground that the make-up of the panel from which they were drawn unfairly narrows the choice of jurors and denies defendants due process of law or equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution. If answered in the affirmative, it means that no conviction by these special juries is constitutionally valid, and all would be set aside if the question had been properly raised at or before trial.

The defendants raise no question as to the constitutionality of the general statutes of New York which prescribe the qualifications, disqualifications and exemptions for ordinary jury service. Neither is any question raised as to the administration of these general statutes by which the population of New York County, numbering some 1,800,000, is sifted to produce a general jury panel of about 60,000, unless it be that there is discrimination against women. It is from this panel that defendants insist, apart from any objection they may have as to improper exclusion of women even from the general panel, they had a constitutional right to have their trial jury drawn. The statutes advanced as a standard may be roughly summarized:

To qualify as a juror, a person must be an American citizen and a resident of the county; not less than 21 nor more than 70 years old; the owner or spouse of an owner of property of the value of \$250; in possession of his or her natural faculties and not infirm or decrepit; nor convicted of a felony or a misdemeanor involving moral turpitude; intelligent; of sound mind and good character; well-informed; able to read and write the English language understandingly. From those qualified the following classes are exempt from service; clergymen, physicians, dentists, pharmacists, embalmers, optometrists, attorneys, members of the Army, Navy or Marine Corps, or of the National Guard or Naval Militia, firemen, policemen, ship's officers, pilots, editors, editorial writers, sub-editors, reporters and copy readers.

Women are equally qualified with men, but as they also are granted exemption, a woman drawn may serve or not, as she chooses.

The attack is focused upon the statutes and sifting procedures which shrink the general panel to the special or "blue ribbon" panel of about 3,000.

Special jurors are selected from those accepted for the general panel by the county clerk, but only after each has been subpoenaed for personal appearance and has testified under oath as to his qualification and fitness. The statute prescribes standards for their selection by declaring ineligible and directing elimination of these classes: (1) All who have been disqualified or who claim and are allowed exemption from general service. (2) All who have been convicted of a criminal offense, or found guilty of fraud or misconduct by judgment of any civil court. (3) All who possess such conscientious opinions with regard to the death penalty as would preclude their finding a defendant guilty if the crime charged be punishable with death. (4) All who doubt their ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence uninfluenced by any such opinion or impression or whose opinion of circumstantial evidence is such as would prevent their finding a verdict of guilty upon such evidence, or who avow such a prejudice against any law of the State as would preclude finding a defendant guilty of a violation of such law, or who avow such a prejudice against any particular defense to a criminal charge as would prevent giving a fair and impartial trial upon the merits of such defense, or who avow that they cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendants' neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.

The special jury panel is not one brought into existence for this particular case nor for any special class of offenses or type of accused. It is part of the regular machinery of trial in counties of one million or more inhabitants. In its sound discretion the court may order trial by special jury on application of either party in a civil action and by either the prosecution or defense in criminal cases. The motion may be granted only on a showing that "by reason of the importance or intricacy of the case, a special jury is required" or "the issue to be tried has been so widely commented upon \* \* \* that an ordinary jury cannot without delay and difficulty be obtained" or that for

any other reason "the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury."

This special jury statute is not recent nor is the practice under it novel. The progenitor of this statute, like it in all pertinent respects, was enacted in 1896 but was repealed and simultaneously reenacted in substantially its present form in 1901. It was soon attacked as on its face violating the State Constitution. The claim of one convicted by a special jury that it was an unconstitutional body because its restrictive composition denied due process of law, was rejected by the Court of Appeals in a well-considered opinion. *People v. Dunn*, 1899, 157 N.Y. 528, 52 N.E. 572, 43 L.R.A. 247. The attack then was made from the opposite direction. One convicted by an ordinary jury claimed that it was an unconstitutional body. This claim that the special panel had withdrawn twenty-five hundred "men of presumably superior intelligence," 162 N.Y. at page 362, 56 N.E. at page 759, too, was rejected by the Court of Appeals. *People v. Meyer*, 1900, 162 N.Y. 357, 56 N.E. 758.

Then, in 1901, an attack on the constitutionality of the statute was rejected by this Court. One Hall had been convicted of murder by a special jury and sentenced to death. He sued out a writ of habeas corpus which was denied below. He challenged the special panel and claimed that his conviction by its verdict was a denial of due process of law and of equal protection of the laws in violation of the Fourteenth Amendment because the jury was "taken from a particular body of citizens and not from the general body of the county as was provided in all cases wherein such special jury was not drawn." This Court affirmed, *Hall v. Johnson*, 186 U.S. 480, 22 S.Ct. 943, 46 L.Ed. 1259, citing among other authorities *Brown v. State of New Jersey*, 175 U.S. 172, 20 S.Ct. 77, 44 L.Ed. 119, which upheld a state statute for a "struck jury."

Since these decisions, the special jury has been in continuous use in New York County in important cases. The District Attorney cites over one hundred murder convictions, on verdict of the special jury, considered by the Court of Appeals which affirmed judgments of death. We are asked, however, to reconsider the question and, in the light of more recent trends of decision and of particular facts about the present operation of the jury system not advanced in support of the argument in earlier case, to disapprove the special jury system.

We fail to perceive on its face any constitutional offense in the statutory standards prescribed for the special panel. The

Act does not exclude, or authorize the clerk to exclude, any person or class because of race, creed, color or occupation. It imposes no qualification of an economic nature beyond that imposed by the concededly valid general panel statute. Each of the grounds of elimination is reasonably and closely related to the juror's suitability for the kind of service the special panel requires or to his fitness to judge the kind of cases for which it is most frequently utilized. Not all of the grounds of elimination would appear relevant to the issues of the present case. But we know of no right of defendants to have a specially constituted panel which would include all persons who might be fitted to hear their particular and unique case. This panel is for service in a wide variety of cases and its eliminations must be judged in that light. We cannot overlook that one of the features which has tended to discredit jury trials is interminable examination and rejection of prospective jurors. In a metropolis with notoriously congested court calendars we cannot find it constitutionally forbidden to set up administrative procedures in advance of trial to eliminate from the panel those who, in a large proportion of cases, would be rejected by the court after its time had been taken in examination to ascertain the disqualifications. Many of the standards of elimination which the clerk is directed to apply in choice of the panel are those the court would have to apply to excuse a juror on challenge for cause. \* \* \*

It has consistently been held that a jury is not rendered constitutionally invalid by failure of the statute to set forth any standards for selection. *Murray v. State of Louisiana*, 163 U.S. 101, 108, 16 S.Ct. 990, 992, 41 L.Ed. 87; *Franklin v. State of South Carolina*, 218 U.S. 161, 167, 168, 30 S.Ct. 640, 642, 54 L.Ed. 980; *Akins v. State of Texas*, 325 U.S. 398, 403, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692; see also *Ex parte Commonwealth of Virginia*, 100 U.S. 339, 348, 25 L.Ed. 676. We find nothing in the standards New York has prescribed which, on its face, is prohibited by the Constitution. There remain, however, more serious questions as to whether the special jury Act has been so administered as to deny due process to the defendants and whether the dual system of jury panels as administered denied equal protection of the laws.

As to the actual results of application of the statute, the litigants are in controversy. \* \* \*

The allegations of fact upon which defendants ask us to hold these special panels unconstitutional come to three: (1) That laborers, operatives, craftsmen, foremen and service employees were systematically, intentionally and deliberately excluded from

the panel. (2) That women were in the same way excluded. (3) That the special panel is so composed as to be more prone to convict than the general panel.

(1) The proof that laborers and such were excluded consists of a tabulation of occupations as listed in the questionnaires filed with the clerk. The table received in evidence is set out in the margin.<sup>14</sup> It is said in criticism of this list that it shows the industry in which these persons work rather than whether they are laborers or craftsmen; that is, "mechanics" may be and probably are also laborers; "bankers" may be clerks. Certainly the tabulation does not show the relation of these jurors to the industry in which they were classified, as, for example, whether they were owners or financially interested, or merely employees. It does not show absence or exclusion of wage earners or of union members, although none listed themselves as "laborers," for several of these classes are obviously of the employee rather than the entrepreneur character. One of petitioners' tables showed that 38% of the special panel were "clerical, sales, and kindred workers." Three of those examined as jurors in this case were members of labor unions. Two were peremptorily challenged by the People and the one accepted by the prosecution was challenged by the defense.

It is sought to give significance to this exhibit showing the breakdown into occupations of some 2,700 special jurors, however, by reference to a tabulation of occupations of some 920,000 employees and persons seeking employment in Manhattan. The comparison is said to show a great disparity between the percentage of jurors of each occupation represented on the jury list of 1945 and the occupational distribution of the number of employed persons or experienced persons seeking employment in Manhattan in 1940. This table was not put in evidence but is reproduced in the margin. Apart from the discrepancy of five years in the dates of the data and the differences in classification of occupations, the two tables do not afford statistical proof that the jury percentages are the result of discrimination. Such a conclusion would be justified only if we knew whether the application of the proper jury standards would affect all occupations alike, of which there is no evidence and which we regard as improbable. The percentage of persons employed or seeking employment in each occupation does not establish even an approximate ratio for those of each occupation that should appear in a fairly selected jury panel. The former is not limited, as the latter must be, to those over 21 or under 70 years of age. It is common knowledge that many employed and

seekers of employment in New York are not, as jurors must be, citizens of the United States. How many could not meet the property qualifications? How many could not read and write the English language understandingly? It is only after effect is given to these admittedly constitutional requirements that we would have any figures which determined or even suggested the effect of the additional disqualifications imposed on special jurors.

An occupational comparison of the special panel with the general panel might afford some ground for an opinion on the effect of the particular practices complained of in the composition of the special panel. But no such comparison is offered. Petitioners' only statement as to the comparative make-up of the general and special panels is as follows: "While the defect of discrimination against women, particularly those who are not members of so-called 'civic conscious' organizations, permeates both the general and special juries, there is no evidence whatever that laborers, operatives, service employees, craftsmen, and foremen, are excluded from the general jury panel." What is more to the point is that petitioners adduced no evidence whatever that the occupational composition of the general panel is substantially different from that of the special. If they are the same, then petitioner's assertion that Question 23, referred to below, somehow separates the rich from the poor is obviously without merit. It is not unlikely that the requirements of citizenship, property and literacy disqualify a greater proportion of laborers, craftsmen and service employees than of some other classes. Those who are illiterate or, if literate in their own, are unable to speak or write the English language, naturally find employment chiefly in manual work. It is impossible from the defendants' evidence in this case to find that the distribution of the jury panel among occupations is not the result of the application of legitimate standards of disqualification. \* \* \*

(3) A more serious allegation against the special jury panel is that it is more inclined than the general panel to convict. Extensive studies have been made by the New York State Judicial Council which is under the duty of continuous study of the procedures of the courts and of making recommendations for improvement to the Legislature. It is on studies and criticisms by this official body that petitioners base their charge here that the special jury is a convicting jury in an unconstitutional sense.

\* \* \*

These defendants were convicted March 15, 1945, when the statistics offered here as to relative propensity of the two juries to convict were more than ten years old, and when the condi-

tions which may have produced the discrepancy in ratio of convictions had long since been corrected.

The evidence in support of these objections may well, as the Judicial Council thought, warrant a political or social judgment that this special panel in 1945 was "unnecessary and undesirable" and that the Legislature should abolish it. But it is quite another matter to say that this Federal Court has a mandate from the Constitution to disable the special jury by setting aside its convictions. The great disparity between a legislative policy or a political judgment on the one hand and a constitutional or legal judgment on the other, finds striking illustration in the position taken by the highest judicial personages in New York State who joined in the recommendation to abolish the special jury.

Two members of the Council who joined in proposing legislation to abolish the dual system sat in this case and abstained from putting their legislative recommendation into a court decision—they sustained as constitutional the system they would abolish as matter of policy. Our function concerns only constitutionality and we turn to the bearing of federal constitutional provisions on the legal issues.

It is not easy, and it should not be easy, for defendants to have proceedings set aside and held for naught on constitutional grounds when they have accepted as satisfactory all of the individual jurors who sat in their case, the jury exercised such discriminating and dispassionate judgment as to acquit them on three of the five counts submitted, and their conviction on a full judicial review of the facts and law has been found justified. This Court has long dealt and must continue to deal with these controversies from state courts with self-imposed restraints intended to protect itself and the state against irresponsible exercise of its unappealable power. \* \* \*

If it were proved that in 1945 an inequality between the special jury's record of convictions and that of the ordinary jury continued as it was found by the Judicial Council to have prevailed in 1933-34, some foundation would be laid for a claim of unequal treatment. No defendant has a right to escape an existing mechanism of trial merely on the ground that some other could be devised which would give him a better chance of acquittal. But in this case an alternative system actually was provided by the state to other defendants. A state is not required to try all classes of offenses to the same forum. But a discretion, even if vested in the court, to shunt a defendant before a jury so chosen as greatly to lessen his chances while others

accused of a like offense are tried by a jury so drawn as to be more favorable to them, would hardly be "equal protection of the laws." Perhaps it could be shown that the difference in percentages of convictions was not due to a difference in attitude of the jurors but to a difference in the cases that were selected for special jury trial, or to a more intensive preparation and effort by the prosecution in cases singled out for such trial. But a ratio of conviction so disparate, if it continued until 1945, might, in absence of explanation, be taken to indicate that the special jury was, in contrast to its alternate, organized to convict. A defendant could complain of this inequality even if it were shown that a special jury court never had convicted any defendant who did not deserve conviction.

But the defendants have failed to show by any evidence whatever that this disparity in ratio of conviction existed in 1945 when they were tried. They show that it ever existed only by the studies and conclusions of the Judicial Council. The same source shows that it was corrected before these defendants were tried. As we have pointed out, this official body challenged the fairness of this dual system as formerly constituted and as early as 1937 declared that "A well-considered jury system will insure an impartial cross-section of the community on every petit jury," and set out means to achieve it. We know of no reason why we should ignore or discredit their assurance that by administrative improvements in the selection of the ordinary juries they became the substantial equivalent of the special jury before these trials took place.

We hold, therefore, that defendants have not carried the burden of showing that the method of their trial denied them equal protection of the law.

The defendants' other objection is grounded on that clause of the Fourteenth Amendment which provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." It comprises objections which might be urged against any jury made up as the special jury was, even if it were the only jury in use in the state. It does not depend upon comparison with the jury facilities afforded other defendants.

This Court, however, has never entertained a defendant's objections to exclusions from the jury except when he was a member of the excluded class. *Rawlins v. State of Georgia*, 201 U.S. 638, 640, 26 S.Ct. 560, 50 L.Ed. 899, 5 Ann.Cas. 783. Cf. *Strauder v. State of West Virginia*, 100 U.S. 303, 25 L.Ed. 664. Relief has been held unavailable to a negro who objected that all white persons were purposely excluded from the grand jury

that indicted him. *Haraway v. State*, 203 Ark. 912, 159 S.W.2d 733. Nevertheless, we need not here decide whether lack of identity with an excluded group would alone defeat an otherwise well-established case under the Amendment. \* \* \*

The other objection which petitioners urge under the due process clause is that the special jury panel was invalidated by exclusion of an economic group comprising such specified classifications as laborers, craftsmen and service employees. They argue that the jury panel was chosen "with a purpose to obtain persons of conservative views, persons of the upper economic and social stratum in New York County, persons having a tendency to convict defendants accused of crime, and to exclude those who might understand the point of view of the laboring man." As we have pointed out, there is no proof of exclusion of these. At most, the proof shows lack of proportional representation and there is an utter deficiency of proof that this was the result of a purpose to discriminate against this group as such. The uncontradicted evidence is that no person was excluded because of his occupation or economic status. All were subjected to the same tests of intelligence, citizenship and understanding of English. The state's right to apply these tests is not open to doubt even though they disqualify, especially in the conditions that prevail in New York, a disproportionate number of manual workers. A fair application of literacy, intelligence and other tests would hardly act with proportional equality on all levels of life. The most that the evidence does is to raise, rather than answer, the question whether there was an unlawful disproportionate representation of lower income groups on the special jury.

Even in the Negro cases this Court has never undertaken to say that a want of proportionate representation of groups, which is not proved to be deliberate and intentional, is sufficient to violate the Constitution. *Akins v. State of Texas*, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692. If the Court has hesitated to require proportional representation where but two groups need be considered and identification of each group is fairly clear, how much more imprudent would it be to require proportional representation of economic classes. The occupations which are said to comprise the economic class allegedly excluded from the special panel are separated by such uncertain lines that the defendants' two exhibits are based on different classifications which are numerous and overlapping. \* \* \*

Nor is there any such persuasive reason for dealing with purposeful occupational or economic discriminations if they do exist as presumptive constitutional violations, as would be the case

with regard to purposeful discriminations because of race or color. We do not need to find prejudice in these latter exclusions, but cf. *Strauder v. State of West Virginia*, 100 U.S. 303, 306-309, 25 L.Ed. 664, for Congress has forbidden them, and a tribunal set up in defiance of its command is an unlawful one whether we think it unfair or not. But as to other exclusions, we must find them such as to deny a fair trial before they can be labeled as unconstitutional. \* \* \*

The function of this federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ. No device, whether conventional or newly devised, can be set up by which the judicial process is reduced to a sham and courts are organized to convict. They must be organized to hear, try and determine on the evidence and the law. But beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court always has been careful not so to interpret this Amendment as to impose uniform procedures upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences. \* \* \*

As there is no violation of a federal statute alleged, the challenge to this judgment under the due process clause must stand or fall on a showing that these defendants have had a trial so unfair as to amount to a taking of their liberty without due process of law. On this record we think that showing has not been made.

Affirmed.

Mr. Justice MURPHY dissented in an opinion joined in by Justices BLACK, DOUGLAS and RUTLEDGE.

#### NOTE

1. A state is not required by any provision in the federal Constitution to provide a jury trial for the trial of any offense against it; *Maxwell v. Dow*, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597 (1900). So far as it provides for it by its own laws, it is prohibited by the equal protection clause of the Fourteenth Amendment from systematically and arbitrarily excluding from a jury persons belonging to a racial or other group to which the accused belongs solely because of their membership in such group; *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880); *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935). For discussions as to what facts do, or do not, disclose violations of this principle, see *Akins v. Texas*, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692 (1945); *Patton v. Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. — (1947).

2. The Sixth Amendment expressly provides that an accused shall have the right to trial by an impartial jury "in all criminal prosecutions." The requirement does not extend to petty offenses, *Callan v. Wilson*, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1888). As to what offenses do, or do not, constitute such offenses, see *District of Columbia v. Colts*, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930); *District of Columbia v. Clawans*, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843 (1937). As to the composition of such jury, see *U. S. v. Wood*, 299 U.S. 123, 57 S.Ct. 177, 81 L.Ed. 78 (1936). The Sixth Amendment confers upon the accused a privilege which he may waive, *Patton v. U. S.*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930); *Adams v. U. S.*, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942).

3. For discussion of extent to which Congress may limit the defenses which an accused may raise, see *Yakus v. U. S.*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1945).

4. The Constitution prohibits both the federal government and the states from passing bills of attainder; *Const.U.S.*, art. 1, §§ 9 and 10. For discussion of what constitute bills of attainder, see *Cummings v. Missouri*, 4 Wall. 277, 18 L.Ed. 356 (1867) (state legislation); *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366 (1867) (federal legislation); *U. S. v. Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L. Ed. 1252 (1946) (federal legislation).

5. See F. Frankfurter and T. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 *Harv.L.Rev.* 917 (1926); S. C. Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 *Mich.L.Rev.* 695 (1927); W. A. Goldberg, *Waiver of Jury in Felony Trials*, 28 *Mich.L.Rev.* 163 (1929); J. A. C. Grant, *Waiver of Jury Trial in Felony Cases*, 20 *Calif.L.Rev.* 132 (1932); Note, *Trial by Jury—Conditions of Valid Waiver*, 41 *Mich.L.Rev.* 495 (1942); E. N. Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 *Va.L.Rev.* 655 (1934).

## UNITED STATES v. LANZA.

Supreme Court of the United States, 1922. 260 U.S. 377, 43 S.Ct. 141,  
67 L.Ed. 314.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is a writ of error by the United States under the Criminal Appeals Act (34 Stat. c. 2564, p. 1246, 18 U.S.C.A. § 682), to reverse an order of the District Court for the Western District of Washington dismissing five counts of an indictment presented against the defendants in error April 28, 1920. The first of these charged the defendants with manufacturing intoxicating liquor, the second with transporting it, the third with possessing it, and the fourth and fifth with having a still and material designed for its manufacture about April 12, 1920, in violation of the National Prohibition Act (chapter 85, 41 Stat. 305, 27 U.S.C.A. § 1 et seq.). The defendants filed a special plea in bar setting out that on April 16, 1920, an information was filed in the superior court of Whatcom county, Wash., charging the same defendants with manufacturing, transporting and having in possession the same liquor, and that on the same day a judgment was entered against each defendant for \$250 for manufacturing, \$250 for transporting, and \$250 for having in possession such liquor. The information was filed under a statute of Washington in force before the going into effect of the Eighteenth Amendment, U.S. C.A.Const. Amend. 18, and passage of the National Prohibition Act. Remington's Code, § 6262—1 et seq., as amended by Sess. Laws 1917, p. 46. The government demurred to the plea. The District Court sustained the plea and dismissed the five counts. *United States v. Peterson*, 268 F. 864. No point is made by the government in the assignments of error that counts 4 and 5, for having a still and material in possession, were not covered by the information and judgment by the state court.

The Eighteenth Amendment is as follows:

"Section 1. After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

The defendants insist that two punishments for the same act, one under the National Prohibition Act and the other under a state law, constitute double jeopardy under the Fifth Amendment, U.S.C.A.Const. Amend. 5; and in support of this position it

is argued that both laws derive their force from the same authority—the second section of the amendment—and therefore that in principle it is as if both punishments were in prosecutions by the United States in its courts.

Consideration of this argument requires an analysis of the reason and purpose of the second section of the amendment. \* \* \*

The amendment was adopted for the purpose of establishing prohibition as a national policy reaching every part of the United States and affecting transactions which are essentially local or intrastate, as well as those pertaining to interstate or foreign commerce. The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several states within their territorial limits shall not cease to exist. Each state, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a state become laws of that state. They may vary in many particulars, including the penalties prescribed, but this is an inseparable incident of independent legislative action in distinct jurisdictions.

To regard the amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that in vesting the national government with the power of country-wide prohibition, state power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the state's power arising out of the federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the amendment took from the states all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this amendment, but from power originally belonging to the states, preserved to them by the Tenth Amendment, U.S.C.A. Const. Amend. 10, and now relieved from the restriction heretofore arising out of the federal Constitution. This is the ratio decidendi of our decision in *Vigliotti v. Pennsylvania*, 258 U.S. 403, 42 S.Ct. 330, 66 L.Ed. 686, April 10, 1922.

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government (*Barron v. City of Baltimore*, 7 Pet. 243, 8 L.Ed. 672), and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority. Here the same act was an offense against the state of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy.

This view of the Fifth Amendment is supported by a long line of decisions by this court. In *Fox v. Ohio*, 5 How. 410, 12 L.Ed. 213, 410, a judgment of the Supreme Court of Ohio was under review. It affirmed a conviction under a state law punishing the uttering of a false United States silver dollar. The law was attacked as beyond the power of the state. One ground urged was that, as the coinage of the dollar was intrusted by the Constitution to Congress, it had authority to protect it against false coins by prohibiting not only the act of making them, but also the act of uttering them. It was contended that if the state could denounce the uttering, there would be concurrent jurisdiction in the United States and the state, a conviction in the state court would be a bar to prosecution in a federal court, and thus a state might confuse or embarrass the federal government in the exercise of its power to protect its lawful coinage. Answering this argument, Mr. Justice Daniel for the court said, 5 How. 434, 12 L.Ed. 213:

"It is almost certain that, in the benignant spirit in which the institutions both of the state and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment

by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion, that offenses falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration."

This conclusion was affirmed in *United States v. Marigold*, 9 How. 560, 569 (13 L.Ed. 257), where the same justice said that—

"The same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the state and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each." \* \* \*

Counsel for defendants in error invoke the principle that as between federal and state jurisdictions over the same prisoner, the one which first gets jurisdiction may first exhaust its jurisdiction to the exclusion of the other. *Ponzi v. Fessenden et al.*, 258 U.S. 254, 42 S.Ct. 309, 66 L.Ed. 607, decided March 27, 1922. This is beside the point and has no application. The effect of the ruling of the court below was to exclude the United States from jurisdiction to punish the defendants after the state court had exhausted its jurisdiction, and when there was no conflict of jurisdiction.

If Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed, it can, of course, do so by proper legislative provision; but it has not done so. If a state were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that state to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect. But it is not for us to discuss the wisdom of legislation; it is enough for us to hold that in the absence of special provision by Congress, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the federal law for the same acts.

Judgment reversed, with direction to sustain the demurrer to the special plea in bar of the defendants and for further proceedings in conformity with this opinion.

## NOTE

1. In *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), it was held that neither the due process nor privileges or immunities clauses of the Fourteenth Amendment impose upon a state the prohibition of the Fifth Amendment against twice putting a person in jeopardy for the same offense. In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947), the Court explicitly assumed that the due process clause of that Amendment prohibited the state from subjecting a person to double jeopardy, but held the accused not to have been subjected thereto. See J. A. C. Grant, the Lanza Rule of Successive Prosecutions, 32 Col.L.Rev. 1309 (1932); Comment, Successive Prosecutions Based on the Same Evidence as Double Jeopardy, 40 Yale L. Jour. 462 (1931); Note, Identity of Offenses: A Study in Judicial Method, 45 Harv.L.Rev. 535 (1932).

2. The Eighth Amendment, prohibiting the federal government from inflicting cruel and unusual punishment, was also assumed, for the sake of argument only, to be applicable to the states as an element in the due process guaranteed by the Fourteenth Amendment, in the case last cited in Note 1. The majority of the Court, however, held the provision not to have been violated by the State's acts involved therein.

3. Treason is the only crime expressly defined by the Constitution, which also prescribes the character of the testimony required for conviction thereof. The subject is exhaustively treated in two cases arising out of the recent war; see *Cramer v. U. S.*, 325 U.S. 1, 65 S.Ct. 918, 89 L.Ed. 1441 (1945); *Haupt v. U. S.*, 330 U.S. 631, 67 S.Ct. 874, 91 L.Ed. 1145 (1947). See W. Hurst, *Treason in the United States*, 58 Harv.L.Rev. 226, 395, 806 (1945); W. Hurst, *English Sources of the American Law of Treason*, Wis.L.Rev. 315 (1945).

## CHAPTER 21

### LIMITATIONS UPON CIVIL AND ADMINISTRATIVE PROCEDURE

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#### HAGAR v. RECLAMATION DIST. NO. 108.

Supreme Court of United States, 1884. 111 U.S. 701, 4 S.Ct. 663, 28 L.Ed. 569.

[Appeal from the federal Circuit Court for California. A California statute provided for the creation by county boards of supervisors of reclamation districts out of overflowed lands so situated as to be susceptible of one mode of reclamation. After the necessary expenses of reclamation had been estimated commissioners appointed by the supervisors were to assess upon each acre reclaimed or benefited an amount proportionate to the whole expense and to the benefits of the reclamation. Hagar's land was included in such a district and he refused to pay his assessment. Suits were brought against him to enforce liens on his land for the assessment. These suits were removed to the federal Circuit Court, which held the liens valid and ordered the land sold to satisfy them.]

Mr. Justice FIELD. \* \* \* The objections urged to the validity of the assessment on federal grounds are substantially these: that the law under which the assessment was made and levied conflicts with the clause of the fourteenth amendment of the Constitution, U.S.C.A.Const. Amend. 14, declaring that no state shall deprive any person of life, liberty, or property without due process of law. \* \* \* It is sufficient to observe here that by "due process" is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. Hurta-

do v. California, 110 U.S. 516, 536, 4 S.Ct. 111, 292, 28 L.Ed. 232.

The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him, or without his being afforded any opportunity to be heard respecting it; the law authorizing it containing no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty, or property. Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in *Davidson v. New Orleans*, 96 U.S. 97, 24 L.Ed. 616: "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

The power of taxation possessed by the state may be exercised upon any subject within its jurisdiction, and to any extent not prohibited by the Constitution of the United States. As said by this court: "It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal Constitution, the power of the state, as to the mode, form, and extent of taxation, is unlimited where the subjects to which it applies are within her jurisdiction."

State Tax on Foreign-Held Bonds, 15 Wall. 300, 319, 21 L.Ed. 179.

Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll-taxes, license taxes, (not dependent upon the extent of his business,) and, generally, specific taxes on things or persons or occupations. In such cases the legislature in authorizing the tax fixes its amount, and that is the end of the matter. If the tax be not paid the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is therefore invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or on domestic corporations for franchises, if the parties desire the privilege they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it. But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law.

In some states, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and

be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the tax-payer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law. In *Davidson v. New Orleans*, this court decided this precise point. \* \* \* The court, speaking by Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case: "That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." 96 U.S. 97, 24 L.Ed. 616.

This decision covers the cases at bar. The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation assessments, if not altered by a board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the tax-payer, and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. *Reclamation Dist. No. 108 v. Evans*, 61 Cal. 104. If property taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, as said by Mr. Justice Miller in the *New Orleans Case*, these words, as used in the Constitution, can have no definite meaning. \* \* \*

Decrees affirmed.

## NOTE

1. Due process requires a taxpayer to be afforded an opportunity to be heard at some stage in the proceedings before his liability is irrevocably fixed with respect to all matters the ascertainment of which involves the exercise of administrative or quasi-judicial functions in determining the existence and extent of his liability; *Turner v. Wade*, 254 U.S. 64, 41 S.Ct. 27, 65 L.Ed. 134 (1920). It does not require this at any particular stage of the proceedings; *Winona & St. P. Land Co. v. Minnesota*, 159 U.S. 526, 16 S.Ct. 83, 40 L.Ed. 247 (1895).

2. Generally taxpayers who fail to take advantage of the opportunity to be heard afforded them lose their right to object to an assessment made against them; *Chicago, M. St. P. & P. R. Co. v. Risty*, 276 U.S. 567, 48 S.Ct. 396, 72 L.Ed. 703 (1928); *McGregor v. Hogan*, 263 U.S. 234, 44 S.Ct. 50, 68 L.Ed. 282 (1923). For cases considering situations in which this rule is not applied, see *Central of Ga. R. Co. v. Wright*, 207 U.S. 127, 28 S.Ct. 47, 52 L.Ed. 134 (1907); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930). See E. B. Stason, *Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies*, 28 Mich.L.Rev. 637 (1930).

3. As to the extent to which due process requires judicial review in tax matters, see *Palmer v. McMahon*, 133 U.S. 660, 10 S.Ct. 324, 33 L.Ed. 772 (1890); *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 57 S.Ct. 816, 81 L.Ed. 1143 (1937).

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OCEANIC STEAM NAVIGATION CO. v. STRANAHAN.

Supreme Court of the United States, 1909.  
214 U.S. 320, 29 S.Ct. 671, 53 L.Ed. 1013.

Mr. Justice WHITE delivered the opinion of the court:

The steamship company sought the recovery of money paid to the collector of customs of the port of New York which was exacted by that official under an order of the Secretary of Commerce and Labor. The findings of the court, the case by stipulation having been tried without a jury, leave no doubt that the money was paid to the collector under protest, and involuntarily. We say this because the findings establish that the company was coerced by the certainty that, if it did not pay, the collector would refuse a clearance to its steamships plying between New York city and foreign ports at periodical and definite sailings, whose failure to depart on time would have caused not only grave public inconvenience from the nonfulfilment of mail contracts, but besides would have entailed upon the company the most serious pecuniary loss consequent on its failure to carry out many other contracts.

Both the Secretary and the collector were expressly authorized by law, the one to impose and the other to collect the exactions which were made. The only question, therefore, is whether the power conferred upon the named officials was consistent with the Constitution. The provision under which the officials acted is § 9 of March 3, 1903, entitled, "An Act to Regulate the Immigration of Aliens into the United States." 32 Stat. at L. chap. 1012, p. 1213. Light to guide in an analysis of the contentions concerning the asserted repugnancy of the section to the Constitution will be afforded by giving at once the merest outline of some of the comprehensive provisions of the act of which it forms a part. \* \* \*

Section 9, which, as we have said, is here involved, is as follows:

"That it shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel, to bring to the United States any alien afflicted with a loathsome or with a dangerous contagious disease; and, if it shall appear to the satisfaction of the Secretary of the Treasury [Secretary of Commerce and Labor] that any alien so brought to the United States was afflicted with such a disease at the time of foreign embarkation and that the existence of such disease might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of one hundred dollars for each and every violation of the provisions of this section; and no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid, nor shall such fine be remitted." \* \* \*

2. But it is argued that even though it be conceded that Congress may, in some cases, impose penalties for the violation of a statutory duty, and provide for their enforcement by civil suit instead of by criminal prosecution, as held in *Hepner v. United States*, nevertheless that doctrine does not warrant the conclusion that a penalty may be authorized, and its collection committed to an administrative officer without the necessity of resorting to the judicial power. In all cases of penalty or punishment, it is contended, enforcement must depend upon the exertion of judicial power, either by civil or criminal process, since the distinction between judicial and administrative functions cannot be preserved consistently with the recognition of an administrative power to enforce a penalty without resort to judicial authority. But the proposition magnifies the judicial to the detriment of all other

departments of the government, disregards many previous adjudications of this court, and ignores practices often manifested and hitherto deemed to be free from any possible constitutional question.

Referring in *Bartlett v. Kane*, 16 How. 263, 14 L.Ed. 931, to the authority of Congress to confide to administrative officers the enforcement of tariff legislation, it was said (p. 272):

"The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are satisfied that such a power was never intended to be given to them. *Decatur v. Paulding*, 14 Pet. 499, 10 L.Ed. 561."

And in the same case, in considering the nature and character of a penalty of 10 per cent which the tariff act of 1842 (5 Stat. at L. 563, chap. 270) authorized administrative officers to impose in cases of undervaluation, it was said (p. 274):

"An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation by the importer, shows that they were exacted as discouragements of fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the acts this additional duty has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, \* \* \* it must still be regarded in the light of a penal duty."

See also *Den ex dem. Murray v. Hoboken Land & Improv. Co.*, 18 How. 272, 15 L.Ed. 372.

In *Passavant v. United States*, 148 U.S. 214, 37 L.Ed. 426, 13 S.Ct. 572, the authority of Congress to delegate to administrative officers final and conclusive authority as to the valuation of imported merchandise, accompanied with the power to impose a penalty for undervaluation, was reiterated, and the doctrine of *Bartlett v. Kane* was applied. And the same principle was upheld in *Origet v. Hedden*, 155 U.S. 228, 39 L.Ed. 130, 15 S.Ct. 92.

In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff, but as to internal revenue, taxation, and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations, and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power. \* \* \*

3. It is urged that the fines which constituted the exactions were repugnant to the 5th Amendment, because amounting to a taking of property without due process of law, since, as asserted, the fines were imposed, in some cases, without any previous notice, and in all cases without any adequate notice or opportunity to defend. Stated in the briefest form, the findings below show that on the arrival of a vessel, if the examining medical officers discovered that an immigrant was afflicted with one of the prohibited diseases, the owner of the vessel was notified of the fact, and, indeed, that the steamship company had at the place where the examination was made what is known as a landing agent, whose business it was to keep informed as to the result of medical examinations, and to know when an immigrant was detained by the medical officers because afflicted with a prohibited disease. The findings also established that, where a fine was imposed under § 9 by the Secretary of Commerce and Labor, it was only done after the transmission to that official of the certificate of the examining medical officer that a particular alien immigrant had been found to be afflicted with one of the prohibited diseases, and that the state of the disease established in the opinion of the medical officer that it existed at the time of embarkation, and could then have been detected by a competent medical examination. Prior to a certain date the action of the Secretary of Commerce and Labor, imposing a fine, was notified to the steamship company, and demand of payment was practically at once made. After a certain date, by what is known as circular No. 58, the same process was followed as to the imposition of the fine, but a period of time—fourteen days—was allowed to intervene between the notice given of the imposition of the fine and its final and compulsory exaction. As to the action of the Secretary of Commerce and Labor before the promulgation of circular No. 58, the court below found that no adequate opportunity was afforded the vessel or its owner to be heard, and, as to the notice given after the promulgation of circular No. 58, it was found that the fourteen days allowed by that circular, and the practice under it, "did not afford the plaintiff a reasonable opportunity to obtain evidence from the port of embarkation and to be heard upon the question whether a fine should be imposed." Much contention is made in argument concerning these findings, it being insisted that there is conflict between them, and different views are taken as to which of the findings should, under the circumstances of the case, be treated as dominant. But into that controversy we do not think it necessary to enter, since, as previously pointed out, it is evident that the statute unambiguously excludes the conception that the steamship company was entitled to be heard, in the sense of raising an issue and tendering evidence concerning the

condition of the alien immigrant upon arrival at the point of disembarkation, as the plain purpose of the statute was to exclusively commit that subject to the medical officers for which the statute provided. We shall, therefore, test the soundness of the proposition we are considering upon that assumption.

In view of the absolute power of Congress over the right to bring aliens into the United States we think it may not be doubted that the act would be beyond all question constitutional if it forbade the introduction of aliens afflicted with contagious diseases, and, as a condition to the right to bring in aliens, imposed upon every vessel bringing them in, as a condition of the right to do so, a penalty for every alien brought to the United States afflicted with the prohibited disease, wholly without reference to when or where the disease originated. It must then follow that the provision contained in the statute is of course valid, since it only subjects the vessel to the exaction when, as the result of the medical examination for which the statute provides, it appears that the alien immigrant afflicted with the prohibited malady is in such a stage of the disease that it must, in the opinion of the medical officer, have existed and been susceptible of discovery at the point of embarkation. Indeed, it is not denied that there was full power in Congress to provide for the examination of the alien by medical officers, and to attach conclusive effect to the result of that examination for the purposes of exclusion or deportation. But it is said the power to do so does not include the right to make the medical examination conclusive for the purpose of imposing a penalty upon the vessel for the negligent bringing in of an alien. We think the argument rests upon a distinction without a difference. It disregards the purpose which, as we have already pointed out, congress had in view in the enactment of the provision; that is, the guarding against the danger to arise from the wrongful taking on board of an alien afflicted with a contagious malady, not only to other immigrant passengers, but ultimately, it might be, to the entire people of the United States,—a danger arising from the possible admission of aliens who might contract the contagion during the voyage, and yet be entitled to admission because apparently not afflicted with the prohibited disease, owing to the fact that the time had not elapsed for the manifestation of its presence. In effect, all the contentions pressed in argument concerning the repugnancy of the statute to the due process clause really disregarded the complete and absolute power of Congress over the subject with which the statute deals. They mistakenly assume that mere form, and not substance, may be made by the courts the conclusive test as to the constitutional power of Congress to enact a statute. These conclusions are apparent, we think, since the plenary power of Congress as to the ad-

mission of aliens leaves no room for doubt as to its authority to impose the penalty, and its complete administrative control over the granting or refusal of a clearance also leaves no doubt of the right to endow administrative officers with discretion to refuse to perform the administrative act of granting a clearance, as a means of enforcing the penalty which there was lawful authority to impose. \* \* \*

Affirmed.

#### NOTE

1. It has also been held that an importer of tea may be denied a right to be heard on the question of whether his tea met the legislatively prescribed standard entitling it to be imported, *Buttfield v. Stranahan*, 192 U.S. 470, 24 S.Ct. 349, 48 L.Ed. 525 (1904). That such determinations are subject to judicial review to determine whether they meet the due process standard of fairness, see *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329, 53 S.Ct. 167, 77 L.Ed. 341 (1932).

2. Due process does not require judicial proceedings to determine the extent of the liability of a revenue collector to the government, and to enforce it; *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 18 How. 272, 15 L.Ed. 372 (1855).

3. Resort to summary executive proceedings for the collection of taxes due the United States does not violate due process if adequate opportunity is afforded for a subsequent judicial determination of the taxpayer's legal rights; *Springer v. U. S.*, 102 U.S. 586, 26 L.Ed. 253 (1881); *Phillips v. C. of I. R.*, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931).

4. For cases considering the extent to which due process permits and also limits, the substitution of executive for judicial process for the temporary deprivation of a person's liberty, see *Moyer v. Peabody*, 212 U.S. 78, 29 S.Ct. 235, 53 L.Ed. 410 (1909); *Sterling v. Constantin*, 287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375 (1932); see *C. Fairman, Martial Rule, in the Light of Sterling v. Constantin*, 19 Cornell L.Quar. 20 (1933).

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#### LAWTON v. STEELE.

Supreme Court of United States, 1894. 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385.

[Error to the Supreme Court of New York. Steele, an officer of New York, acting under the authority of the statute quoted in the opinion below, seized and destroyed fifteen nets owned by Lawton, found to be worth \$216. Lawton was a fisherman, and at the time most of the nets were being used in fishing in New York waters in Jefferson county, and the rest were lying on the shore, having been recently used for the same purpose. Lawton sued Steele for the value of the destroyed nets, and a judgment

for plaintiff was reversed by the state Court of Appeals, and judgment for defendant ordered to be entered in the state Supreme Court.]

Mr. Justice BROWN. This case involves the constitutionality of an act of the Legislature of the state of New York \* \* \* This last section was alleged to be unconstitutional and void for three reasons: (1) As depriving the citizen of his property without due process of law. \* \* \*

The main, and only real difficulty connected with the act in question is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries, is to be treated as a public nuisance, "and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and ever game constable to seize, remove, and forthwith destroy the same." The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offence, and to take such measures as were reasonable and necessary to prevent such offences in the future. It certainly could not do this more effectually than by destroying the means of the offence. If the nets were being used in a manner detrimental to the interest of the public, we think it was within the power of the legislature to declare them to be nuisances, and to authorize the officers of the state to abate them. *Hart v. The Mayor*, 9 Wend., N.Y., 571, 24 Am.Dec. 165; *Meeker v. Van Rensselaer*, 15 Wend., N.Y., 397.

An act of the Legislature which has for its object the preservation of the public interests against the illegal depredations of private individuals ought to be sustained, unless it is plainly violative of the Constitution, or subversive of private rights. In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated, and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this

are the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. *Newark, etc., Ry. Co. v. Hunt*, 50 N.J.L. 308, 12 A. 697; *Blazier v. Miller*, 10 Hun, N.Y., 435; *Mouse's Case*, 12 Coke, 62; *Stone v. The Mayor*, 25 Wend., N.Y., 157, 173; *Am. Print Works v. Lawrence*, 21 N.J.L. 248; *Same v. Same*, 23 N.J.L. 590, 57 Am.Dec. 420.

It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling-room.

The value of the nets in question was but \$15 apiece. The cost of condemning one (and the use of one is as illegal as the use of a dozen), by judicial proceedings, would largely exceed the value of the net, and doubtless the state would, in many cases, be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficent one, and the state ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation.

There is not a state in the Union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet from time immemorial the practice has been to try persons charged with petty offences before a police magistrate, who not only passes upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the Constitution, though technically a person may in this way be deprived of his liberty without the intervention of a jury. *Callan v. Wilson*, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223, and cases cited. So the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the Constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with the established principles in that regard.

Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute. As was said by the Supreme Court of New Jersey in a similar case (*Am. Print Works v. Lawrence*, 21 N.J.L. 248, 259): "The party is not, in point of fact, deprived of a trial by jury. The evidence necessary to sustain the defence is changed. Even if the party were deprived of a trial by jury, the statute is not, therefore, necessarily unconstitutional." Indeed, it is scarcely possible that any actual injustice could be done in the practical administration of the act.

It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose (*Ely v. Supervisors*, 36 N.Y. 297), but where minor articles of personal property are devoted to such use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them. The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question (*People v. West*, 106 N.Y. 293, 12 N.E. 610, 60 Am.Rep. 452), and

in such case the legislature may annex to the prohibited act all the incidents of a criminal offence, including the destruction of property denounced by it as a public nuisance.

In *Weller v. Snover*, 42 N.J.L. 341, it was held that a fish warden for a county, appointed by the Governor, had the right, under an act of the Legislature, to enter upon land and destroy a fish basket constructed in violation of the statute, together with the materials of which it was composed, so that it might not again be used. It was stated in that case that "after a statute has declared an invasion of a public right to be a nuisance it may be abated by the destruction of the object used to effect it. The person who, with actual or constructive notice of the law, sets up such nuisance cannot sue the officer whose duty it has been made by the statute to execute its provisions." So in *Williams v. Blackwall*, 2 H. & C. 33, the right to take possession of or destroy any engine placed or used for catching salmon in contravention of law was held to extend to all persons, and was not limited to conservators or officers appointed under the act.

It is true there are several cases of a contrary purport. Some of these cases, however, may be explained upon the ground that the property seized was of considerable value (*Jeck v. Anderson*, 57 Cal. 251, 40 Am.Rep. 115, boats as well as nets; *Dunn v. Burleigh*, 62 Me. 24, teams and supplies in lumbering; *King v. Hayes*, 80 Me. 206, 13 A. 882, a horse)—in others the court seems to have taken a more technical view of the law than the necessities of the case or an adequate protection of the owner required. *Lowry v. Rainwater*, 70 Mo. 152, 35 Am.Rep. 420; *State v. Robins*, 124 Ind. 308, 24 N.E. 978, 8 L.R.A. 438; *Ridgeway v. West*, 60 Ind. 371. \* \* \*

Judgment affirmed.

[FULLER, C. J., gave a dissenting opinion, in which concurred FIELD and BREWER, JJ.]

## NOTE

1. That due process requires that the person whose property is summarily destroyed be afforded a subsequent opportunity to be heard on the legality of its destruction in some form of judicial proceeding, and that he be compensated, either from the public or the officials, if the destruction is found to be illegal, see *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L. Ed. 195 (1908).

2. See T. R. Powell, *Administrative Exercises of the Police Power*, 24 Harv.L.Rev. 268, 333, 441 (1911); Note, *Administrative Determinations of Private Rights*, 35 Harv.L.Rev. 450 (1922).

## MORGAN v. UNITED STATES.

Supreme Court of the United States, 1938. 304 U.S. 1, 58 S.Ct. 773,  
82 L.Ed. 1129.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

This case presents the question of the validity of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies at the Kansas City Stockyards. Packers and Stockyards Act 1921, 42 Stat. 159; 7 U.S.C. §§ 181-229, 7 U.S.C.A. § 181 et seq. The District Court of three judges dismissed the bills of complaint in fifty suits (consolidated for hearing) challenging the validity of the rates, and the plaintiffs bring this direct appeal. 7 U.S.C. § 217, 7 U.S.C.A. § 217; 28 U.S.C. § 47, 28 U.S.C.A. § 47.

The case comes here for the second time. On the former appeal we met, at the threshold of the controversy, the contention that the plaintiffs had not been accorded the hearing which the statute made a prerequisite to a valid order. The District Court had struck from plaintiffs' bills the allegations that the Secretary had made the order without having heard or read the evidence and without having heard or considered the arguments submitted, and that his sole information with respect to the proceeding was derived from consultation with employees in the Department of Agriculture. We held that it was error to strike these allegations, that the defendant should be required to answer them, and that the question whether plaintiffs had a proper hearing should be determined. 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288.

After the remand, the bills were amended and interrogatories were directed to the Secretary which he answered. The court received the evidence which had been introduced at its previous hearing, together with additional testimony bearing upon the nature of the hearing accorded by the Secretary. This evidence embraced the testimony of the Secretary and of several of his assistants. The District Court rendered an opinion, with findings of fact and conclusions of law, holding that the hearing before the Secretary was adequate and, on the merits, that his order was lawful. On this appeal, plaintiffs again contend (1) that the Secretary's order was made without the hearing required by the statute; and (2) that the order was arbitrary and unsupported by substantial evidence.

The first question goes to the very foundation of the action of administrative agencies intrusted by the Congress with broad control over activities which in their detail cannot be dealt with

directly by the Legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasijudicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing," essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an "inexorable safeguard." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73, 56 S.Ct. 720, 735, 80 L.Ed. 1033; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 304, 305, 57 S.Ct. 724, 730, 81 L.Ed. 1093; *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U.S. 388, 393, 58 S.Ct. 334, 338, 82 L. Ed. 319; *Morgan v. United States*, *supra*. And in equipping the Secretary of Agriculture with extraordinary powers under the Packers and Stockyards Act, the Congress explicitly recognized and emphasized this requirement by making his action depend upon a "*full hearing*." Section 310, 7 U.S.C.A. § 211.

In the record now before us the controlling facts stand out clearly. The original administrative proceeding was begun on April 7, 1930, when the Secretary of Agriculture issued an order of inquiry and notice of hearing with respect to the reasonableness of the charges of appellants for stockyards services at Kansas City. The taking of evidence before an examiner of the Department was begun on December 3, 1930, and continued until February 10, 1931. The Government and appellants were represented by counsel, and voluminous testimony and exhibits were introduced. In March, 1931, oral argument was had before the Acting Secretary of Agriculture and appellants submitted a brief. On May 18, 1932, the Secretary issued his findings and an order prescribing maximum rates. In view of changed economic conditions, the Secretary vacated that order and granted a rehearing. That was begun on October 6, 1932, and the taking of evidence was concluded on November 16, 1932. The evidence received at the first hearing was resubmitted, and this was supplemented by additional testimony and exhibits. On March 24, 1933, oral argument was had before Rexford G. Tugwell as Acting Secretary.

It appears that there were about 10,000 pages of transcript of oral evidence and over 1,000 pages of statistical exhibits. The oral argument was general and sketchy. Appellants submitted

the brief which they had presented after the first administrative hearing and a supplemental brief dealing with the evidence introduced upon the rehearing. No brief was at any time supplied by the Government. Apart from what was said on its behalf in the oral argument, the Government formulated no issues and furnished appellants no statement or summary of its contentions and no proposed findings. Appellants' request that the examiner prepare a tentative report, to be submitted as a basis for exceptions and argument, was refused.

Findings were prepared in the Bureau of Animal Industry, Department of Agriculture, whose representatives had conducted the proceedings for the Government, and were submitted to the Secretary who signed them, with a few changes in the rates, when his order was made on June 14, 1933. These findings, 180 in number, were elaborate. They dealt with the practices and facilities at the Kansas City livestock market, the character of appellants' business and services, their rates and the volume of their transactions, their gross revenues, their methods in getting and maintaining business, their joint activities, the economic changes since the year 1929, the principles which governed the determination of reasonable commission rates, the classification of cost items, the reasonable unit costs plus a reasonable amount of profits to be covered into reasonable commission rates, the reasonable amounts to be included for salesmanship, yarding salaries and expenses, office salaries and expenses, business getting and maintaining expenses, administrative and general expenses, insurance, interest on capital, and profits, together with summary and the establishment of the rate structure. Upon the basis of the reasonable costs as thus determined, the Secretary found that appellants' schedules of rates were unreasonable and unjustly discriminatory, and fixed the maximum schedules of the just and reasonable rates thereafter to be charged.

No opportunity was afforded to appellants for the examination of the findings thus prepared in the Bureau of Animal Industry until they were served with the order. Appellants sought a rehearing by the Secretary, but their application was denied on July 6, 1933, and these suits followed.

The part taken by the Secretary himself in the departmental proceedings is shown by his full and candid testimony. The evidence had been received before he took office. He did not hear the oral argument. The bulky record was placed upon his desk and he dipped into it from time to time to get its drift. He decided that probably the essence of the evidence was con-

tained in appellants' briefs. These, together with the transcript of the oral argument, he took home with him and read. He had several conferences with the Solicitor of the department and with the officials in the Bureau of Animal Industry, and discussed the proposed findings. He testified that he considered the evidence before signing the order. The substance of his action is stated in his answer to the question whether the order represented his independent conclusion, as follows: "My answer to the question would be that that very definitely was my independent conclusion as based on the findings of the men in the Bureau of Animal Industry. I would say, I will try to put it as accurately as possible, that it represented my own independent reactions to the findings of the men in the Bureau of Animal Industry."

Save for certain rate alterations, he "accepted the findings."

In the light of this testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required. The Secretary read the summary presented by appellants' briefs and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport. But a "full hearing"—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasijudicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

No such reasonable opportunity was accorded appellants. The administrative proceeding was initiated by a notice of inquiry into the reasonableness of appellants' rates. No specific complaint was formulated and, in a proceeding thus begun by the Secretary on his own initiative, none was required. Thus, in the absence of any definite complaint, and in a sweeping investigation, thousands of pages of testimony were taken by the examiner and numerous complicated exhibits were introduced bearing upon all phases of the broad subject of the conduct of the market agencies. In the absence of any report by the examiner

or any findings proposed by the Government, and thus without any concrete statement of the Government's claims, the parties approached the oral argument.

Nor did the oral argument reveal these claims in any appropriate manner. The discussion by counsel for the Government was "very general," as he said, in order not to take up "too much time." It dealt with generalities both as to principles and procedure. Counsel for appellants then discussed the evidence from his standpoint. The Government's counsel closed briefly, with a few additional and general observations. The oral argument was of the sort which might serve as a preface to a discussion of definite points in a brief, but the Government did not submit a brief. And the appellants had no further information of the Government's concrete claims until they were served with the Secretary's order.

Congress, in requiring a "full hearing," had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to the mere form of the proceeding and ignores realities. In all substantial respects, the Government acting through the Bureau of Animal Industry of the Department was prosecuting the proceeding against the owners of the market agencies. The proceeding had all the essential elements of contested litigation, with the Government and its counsel on the one side and the appellants and their counsel on the other. It is idle to say that this was not a proceeding in reality against the appellants when the very existence of their agencies was put in jeopardy. Upon the rates for their services the owners depended for their livelihood and the proceeding attacked them at a vital spot. This is well shown by the fact that, on the merits, appellants are here

contending that under the Secretary's order many of these agencies, although not found to be inefficient or wasteful, will be left with deficits instead of reasonable compensation for their services, and will be compelled to go out of business. And to this the Government responds that if as a result of the prescribed rates some agencies may be unable to continue, because through existing competition there are too many, that fact will not invalidate the order. While we are not now dealing with the merits, the breadth of the Secretary's discretion under our rulings applicable to such a proceeding, *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 50 S.Ct. 220, 74 L.Ed. 524; *Acker v. United States*, 298 U.S. 426, 56 S.Ct. 824, 80 L.Ed. 1257, places in a strong light the necessity of maintaining the essentials of a full and fair hearing, with the right of the appellants to have a reasonable opportunity to know the claims advanced against them as shown by the findings proposed by the Bureau of Animal Industry. \* \* \*

The maintenance of proper standards on the part of administrative agencies in the performance of their quasijudicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

As the hearing was fatally defective, the order of the Secretary was invalid. In this view, we express no opinion upon the merits. The decree of the District Court is reversed.

It is so ordered.

Reversed.

Mr. Justice BLACK dissents.

## NOTE

1. So far as legislation gives finality to the determinations of administrative agencies, due process requires that those affected thereby be given adequate notice and an opportunity to be heard thereon. It has been held that this requirement is satisfied if such notice and opportunity are in fact given them, even though the statute under which the agency acted did not expressly require this; *American Power & Light Co. v. Security and Exchange Commission*, 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946).

2. For other cases considering elements included in a fair hearing, see *Cooke v. U. S.*, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925); *Georgia Railway & Electric Co. v. Decatur*, 295 U.S. 165, 55 S.Ct. 701, 79 L.Ed. 1365 (1935); *Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio*, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937); *Railroad Comm. of California v. Pac. Gas & Electric Co.*, 302 U.S. 388, 58 S.Ct. 334, 82 L.Ed. 319 (1938).

3. Due process does not require that those affected by an exercise of a purely legislative power, such as the enactment of a rate ordinance or the administrative fixing of rents be given notice and an opportunity to be heard, where adequate judicial review is provided when the rates or rents are sought to be enforced in specific cases, *Home Tel. & Tel. Co. v. Los Angeles*, 211 U.S. 265, 29 S.Ct. 50, 53 L.Ed. 176 (1908); *Bowles v. Willingham*, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944). See also *Opp Cotton Mills, Inc. v. Administrator of Wages, etc.*, 312 U.S. 126, 61 S.Ct. 524, 85 L.Ed. 624 (1941).

4. See C. S. Pillsbury, *Administrative Tribunals*, 36 *Harv.L.Rev.* 405, 583 (1923); Note, *Judicial Notice by Administrative Tribunals*, 44 *Yale L.Jour.* 355 (1934); Note, *Requisites of an Administrative Hearing*, 80 *U.Pa.L.Rev.* 878 (1932); Note, *Judicial Control of Administrative Procedure: The Morgan Cases*, 52 *Harv.L.Rev.* 509 (1939).

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St. JOSEPH STOCK YARDS CO. v. UNITED STATES.

Supreme Court of the United States, 1936. 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

This suit was brought by St. Joseph Stock Yards Company to restrain the enforcement of an order of the Secretary of Agriculture fixing maximum rates for the company's services. The

District Court composed of three judges dismissed the bill of complaint (11 F.Supp. 322) and appeal lies directly to this Court. 7 U.S.C. § 217, 7 U.S.C.A. § 217; 28 U.S.C. § 47, 28 U.S.C.A. § 47.

In October, 1929, the Secretary of Agriculture initiated a general inquiry into the reasonableness of appellant's rates. After hearing, the Secretary prescribed maximum rates which were enjoined by the District Court. *St. Joseph Stock Yards Co. v. United States*, 58 F.2d 290. The Secretary reopened the proceeding and hearing was had in 1933. While the matter was under consideration, appellant filed in February, 1934, a petition for a further hearing. On May 4, 1934, the Secretary denied the petition and made the order now in question. \* \* \*

*First. The Secretary's Findings.*—The findings are elaborate. They include detailed findings with respect to the services rendered by appellant and its rates, the used and useful character of appellant's property, the valuation of used and useful land, the value of appellant's structures on the basis of cost of reproduction new less depreciation, working capital, going concern value, fair value on the basis of the facts found, fair rate of return, reasonable operating expenses (including repairs, depreciation and taxes), necessary revenue, and volume of business. The Secretary found that the existing rates produced revenues in excess of those necessary to pay reasonable expenses and afford a fair return; that "the schedule of rates and charges now in effect is unreasonable and unjustly discriminatory."

As a guide to his determination of reasonable rates, the Secretary caused an analysis to be made of the books and records of the appellant covering the six-year period from 1927 to 1932. He reached his conclusion in the light of that evidence. Appellant contends that, as a prerequisite to a reduction of rates, it was necessary for the Secretary to find that the rates were unreasonable "at the time of the hearing," and that there were no findings to support such a conclusion with respect to the year 1932, the year immediately preceding the hearing. But, in determining whether the existing rates were unreasonable, the Secretary was not confined to evidence as to their operation at the precise time of his hearing, or in the months, or even a year, immediately prior thereto. He was entitled to consider the conditions which then obtained and also to extend his examination over such a reasonable period of past operations as would enable him to make a fair prediction in fixing the maximum rates to be charged in the future. The Secretary had before him the particular conditions which prevailed in the year 1932 and in the selection of the six-year period including that year, and in not

taking the year 1932 as a sole criterion we find nothing arbitrary. There are also objections to the failure of the Secretary to make specific findings on certain points of fact, but, so far as the requirement of findings is concerned, we think that the extensive findings that were made adequately supported his order. \* \*

*Third. The Scope of Judicial Review upon the Issue of Confiscation.*—The question is not one of fixing a reasonable charge for a mere personal service subject to regulation under the commerce power, as in the case of market agencies employing but little capital. See *Tagg Bros. & Moorhead v. United States*, supra, 280 U.S. 420, at pages 438, 439, 50 S.Ct. 220, 74 L.Ed. 524. Here a large capital investment is involved and the main issue is as to the alleged confiscation of that investment.

A preliminary question is presented by the contention that the District Court, in the presence of this issue, failed to exercise its independent judgment upon the facts. \* \* \* The District Court thought that the question was still an open one under the Packers and Stockyards Act, and expressed the view that, even though the issue is one of confiscation, the court is bound to accept the findings of the Secretary if they are supported by substantial evidence and that it is not within the judicial province to weigh the evidence and pass upon the issues of fact. The government points out that, notwithstanding what was said by the court upon this point, the court carefully analyzed the evidence, made many specific findings of its own, and in addition adopted, with certain exceptions, the findings of the Secretary. The government insists that appellant thus had an adequate judicial review, and, further, that the case is in equity and comes before the court on appeal, and that from every point of view the clear preponderance of the evidence shows that the prescribed rates were in fact just and reasonable. Hence the government says that the decree should be affirmed, irrespective of possible error in the reasoning of the District Court. See *West v. Chesapeake & Potomac Telephone Co.*, 295 U.S. 662, 680, 55 S.Ct. 894, 79 L.Ed. 1640.

In view, however, of the discussion in the court's opinion, the preliminary question should be considered. The fixing of rates is a legislative act. In determining the scope of judicial review of that act, there is a distinction between action within the sphere of legislative authority and action which transcends the limits of legislative power. Exercising its rate-making authority, the Legislature has a broad discretion. It may exercise that authority directly, or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards. The court does not sit as a board of revision to substitute its judg-

ment for that of the Legislature or its agents as to matters within the province of either. *San Diego Land & Town Co. v. Jasper*, 189 U.S. 439, 446, 23 S.Ct. 571, 47 L.Ed. 892; *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U.S. 352, 433, 33 S.Ct. 729, 57 L.Ed. 1511, 48 L.R.A.(N.S.) 1151, Ann.Cas.1916A, 18; *Los Angeles Gas & Elec. Corp. v. Railroad Commission*, 289 U.S. 287, 304, 53 S.Ct. 637, 77 L.Ed. 1180. When the Legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the Legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U.S. 88, 91, 33 S.Ct. 185, 57 L.Ed. 431; *Virginian Railway Co. v. United States*, 272 U.S. 658, 663, 47 S.Ct. 222, 71 L.Ed. 463; *Tagg Bros. & Moorhead v. United States*, *supra*, 280 U.S. 420, at page 444, 50 S.Ct. 220, 74 L.Ed. 524; *Florida v. United States*, 292 U.S. 1, 12, 54 S.Ct. 603, 78 L.Ed. 1077. In such cases the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority.

But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the Legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The Legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the Legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of lib-

erty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But, if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. This is the purport of the decisions above cited with respect to the exercise of an independent judicial judgment upon the facts where confiscation is alleged. The question under the Packers and Stockyards Act is not different from that arising under any other act, and we see no reason why those decisions should be overruled.

But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. Moreover, as the question is whether the legislative action has passed beyond the lowest limit of the permitted zone of reasonableness into the forbidden reaches of confiscation, judicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests. We have said that "in a question of rate-making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing." *Darnell v. Edwards*, 244 U.S. 564, 569, 37 S.Ct. 701, 703, 61 L.Ed. 1317. The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate-making

power unless confiscation is clearly established. *Los Angeles Gas & Electric Co. v. Railroad Commission*, 289 U.S. 287, 305, 53 S.Ct. 637, 77 L.Ed. 1180; *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 169, 54 S.Ct. 658, 78 L.Ed. 1182; *Dayton Power & Light Co. v. Public Utilities Commission*, 292 U.S. 290, 298, 54 S.Ct. 647, 78 L.Ed. 1267.

A cognate question was considered in *Manufacturers' Railway Company v. United States*, 246 U.S. 457, 470, 488-490, 38 S.Ct. 383, 392, 62 L.Ed. 831. There, appellees insisted that the finding of the Interstate Commerce Commission upon the subject of confiscation was conclusive, or at least that it was not subject to be attacked upon evidence not presented to the Commission. We did not sustain that contention. Nevertheless, we pointed out that correct practice required that "in ordinary cases, and where the opportunity is open," all the pertinent evidence should be submitted in the first instance to the Commission. The Court did not approve the course that was pursued in that case "of withholding from the Commission essential portions of the evidence that is alleged to show the rate in question to be confiscatory." And it was regarded as beyond debate that, where the Commission after full hearing had set aside a given rate as unreasonably high, it would require a "clear case" to justify a court, "upon evidence newly adduced but not in a proper sense newly discovered," in annulling the action of the Commission upon the ground that the same rate was so unreasonably low as to deprive the carrier of its constitutional right of compensation. With that statement the Court turned to an examination of the evidence. The principle thus recognized with respect to the weight to be accorded to action by the Commission after full hearing applies a fortiori when the case is heard upon the record made before the Commission or, as in this case, upon the record made before the Secretary of Agriculture. It follows, in the application of this principle, that, as the ultimate determination whether or not rates are confiscatory ordinarily rests upon a variety of subordinate or primary findings of fact as to particular elements, such findings made by a legislative agency after hearing will not be disturbed save as in particular instances they are plainly shown to be overborne.

As the District Court, despite its observations as to the scope of review, apparently did pass upon the evidence, making findings of its own and adopting findings of the Secretary, we do not think it necessary to remand the cause for further consideration, and we turn to the other questions presented by the appeal.

\* \* \*

We conclude that the appellant has failed to prove confiscation, and the decree of the District Court is affirmed.

Affirmed.

Mr. Justice ROBERTS concurs in the result.

Mr. Justice BRANDEIS wrote a concurring opinion.

### NOTE

1. The doctrine that due process requires that a court, authorized to review administrative decisions whose constitutional validity depended upon the existence of certain facts, should be permitted to exercise its own independent judgment as to the findings of such facts, was firmly established by *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908 (1920). For a discussion on the extent to which this may be required as a necessary part of the judicial power conferred upon constitutional courts by the United States Constitution, see *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932).

2. In his concurring opinion in the reported case Justice Brandeis denied the position of Chief Justice Hughes that due process required an independent decision on the facts of value in a case in which publicly prescribed rates were being assailed as confiscatory. In view of the changes that have occurred in judicial ideas as to the importance of value in rate cases, it is doubtful that the doctrine of the *Ben Avon Case* and the reported case are still law. See paragraph 2 of Note on p. 566. He would, however, require ultimate judicial determination of the existence of "constitutional facts" in cases involving rights of person.

3. In *Gray v. Powell*, 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301 (1941), the Court accepted as final the determination that Powell was not exempted as a "producer" from the provisions of the *Bituminous Coal Act*. The majority opinion stated: "Such a determination as is here involved belongs to the usual administrative routine. \* \* \* Where as here a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. Certainly a finding on Congressional reference that an admittedly constitutional act is applicable to a particular situation does not require further scrutiny. Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director. It is not the province of a court to absorb the administrative function to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action."

4. See Note, *Administrative Law—Scope of Judicial Review—Doctrine of Ben Avon Case*, 39 Mich.L.Rev. 438 (1941); R. A. Brown, *The Function of Courts and Commissions in Public Utility Rate Regulation*, 38 Harv.L.Rev. 141 (1924); S. C. Oppenheimer, *The Supreme Court and Administrative Law*, 37 Col.L.Rev. 1 (1937); J. Dickinson, *Crowell v. Benson, Judicial Review of Administrative Determinations of Questions of "Constitutional Facts"*, 80 U. Pa.L.Rev. 1055 (1932).

5. Due process prohibits so burdening the exercise of the right to judicial review as to practically force those entitled thereto to forego it as the lesser of two evils, *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596 (1920); but does not prohibit subjecting it to reasonable regulation, *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U.S. 510, 32 S.Ct. 535, 56 L.Ed. 863 (1912).

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### UNITED STATES v. JU TOY.

Supreme Court of United States, 1905. 198 U.S. 253, 25 S.Ct. 644, 49 L.Ed. 1040.

Mr. Justice HOLMES. This case comes here on a certificate from the circuit court of appeals presenting certain questions of law. It appears that the appellee, being detained by the master of the steamship *Doric* for return to China, presented a petition for habeas corpus to the district court, alleging that he was a native-born citizen of the United States, returning after a temporary departure, and was denied permission to land by the collector of the port of San Francisco. It also appears from the petition that he took an appeal from the denial, and that the decision was affirmed by the Secretary of Commerce and Labor. No further grounds are stated. The writ issued, and the United States made return, and answered, showing all the proceedings before the Department, which are not denied to have been in regular form, and setting forth all of the evidence and the orders made. The answer also denied the allegations of the petition. Motions to dismiss the writ were made on the grounds that the decision of the Secretary was conclusive, and that no abuse of authority was shown. These were denied, and the district court decided, seemingly on new evidence, subject to exceptions, that Ju Toy was a native-born citizen of the United States. An appeal was taken to the circuit court of appeals, alleging errors the nature of which has been indicated. Thereupon the latter court certified the following questions: \* \* \*

“Third. In a habeas corpus proceeding in a district court of the United States, instituted \* \* \* [upon the grounds of this case], should the court treat the finding and action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same, and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them, or, in some other way, in hearing and determining the same, committed prejudicial error?” \* \* \*

The broad question is presented whether or not the decision of the Secretary of Commerce and Labor is conclusive. It was held in *United States v. Sing Tuck*, 194 U.S. 161, 167, 920, 24 S. Ct. 621, 48 L.Ed. 917, that the act of August 18, 1894 (28 Stat. 372, 390, c. 301, § 1), purported to make it so, but whether the statute could have that effect constitutionally was left untouched, except by a reference to cases where an opinion already had been expressed. To quote the latest first, in *Japanese Immigrant Case, Yamataya v. Fisher*, 189 U.S. 86, 97, 724, 23 S.Ct. 611, 613, 47 L.Ed. 721, it was said: "That Congress may exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain classes of aliens may come to this country, establish regulations for sending out of the country such aliens as come here in violation of law, and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court." See, also, *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290, 291, 24 S.Ct. 719, 48 L.Ed. 979, 983, 984; *Chin Bak Kan v. United States*, 186 U.S. 193, 200, 22 S.Ct. 891, 46 L.Ed. 1121, 1125. In *Fok Young Yo v. United States*, 185 U.S. 296, 304, 305, 22 S.Ct. 686, 46 L.Ed. 917, 921, it was held that the decision of the collector of customs on the right of transit across the territory of the United States was conclusive, and, still more to the point, in *Lem Moon Sing v. United States*, 158 U.S. 538, 15 S.Ct. 967, 39 L.Ed. 1082, where the petitioner for habeas corpus alleged facts which, if true, gave him a right to enter and remain in the country, it was held that the decision of the collector was final as to whether or not he belonged to the privileged class.

It is true that it may be argued that these cases are not directly conclusive of the point now under decision. It may be said that the parties concerned were aliens, and that although they alleged absolute rights, and facts which it was contended went to the jurisdiction of the officer making the decision, still their rights were only treaty or statutory rights, and therefore were subject to the implied qualification imposed by the later statute, which made the decision of the collector with regard to them final. The meaning of the cases, and the language which we have quoted, is not satisfied by so narrow an interpretation, but we do not delay upon them. They can be read.

It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed,—as well when it is citizenship as when it is domicil, and the belonging to

a class excepted from the exclusion acts. *United States v. Sing Tuck*, 194 U.S. 161, 167, 24 S.Ct. 621, 48 L.Ed. 917, 920; *Lem Moon Sing v. United States*, 158 U.S. 538, 546, 547, 15 S.Ct. 967, 39 L.Ed. 1082. It also is established by the former case and others which it cites that the relevant portion of the act of August 18, 1894 (28 Stat. 372, c. 301), is not void as a whole. The statute has been upheld and enforced. But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again \* \* \* [citing *U. S. v. Reese*, 92 U.S. 214, and other cases]. It necessarily follows that when such words are sustained, they are sustained to their full extent.

In view of the cases which we have cited it seems no longer open to discuss the question propounded as a new one. Therefore we do not analyze the nature of the right of a person presenting himself at the frontier for admission. In *re Ross*, *Ross v. McIntyre*, 140 U.S. 453, 464, 11 S.Ct. 897, 35 L.Ed. 581, 586. But it is not improper to add a few words. The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the fifth amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial. That is the result of the cases which we have cited, and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be intrusted to an executive officer, and that his decision is due process of law, was affirmed and explained in *Nishimura Ekiu v. United States*, 142 U.S. 651, 660, 12 S.Ct. 336, 35 L.Ed. 1146, 1149, and in *Fong Yue Ting v. United States*, 149 U.S. 698, 713, 13 S.Ct. 1016, 37 L.Ed. 905, 913, before the authorities to which we already have referred. It is unnecessary to repeat the often-quoted remarks of Mr. Justice Curtis, speaking for the whole court in *Den ex dem. Murray v. Hoboken Land & Improv. Co.*, 18 How. 272, 280, 15 L.Ed. 372, 376, to show that the requirement of a judicial trial does not prevail in every case. *Lem Moon Sing v. United States*, 158 U.S. 538, 546, 547, 15 S.Ct. 967, 39 L.Ed. 1082, 1085; *Japanese Immigrant Case (Yamataya v. Fisher)* 189 U.S. 86, 100, 23 S.Ct. 611, 47 L.Ed. 721, 725; *Public Clearing House v. Coyne*, 194 U.S. 497, 508, 509, 24 S.Ct. 789, 48 L.Ed. 1092, 1098.

We are of opinion that \* \* \* the third question should be answered, "Yes." \* \* \*

So certified.

[BREWER, J., gave a dissenting opinion, in which PECKHAM, J., concurred. DAY, J., also dissented.]

#### NOTE

1. The holding of the reported case was reaffirmed in *Quon Quon Poy v. Johnson*, 273 U.S. 352, 47 S.Ct. 346, 71 L.Ed. 680 (1927). But in deportation cases citizenship is deemed a "constitutional fact" whose final determination must be left with the courts under the due process clause of the Fifth Amendment, *Ng Fung Ho v. White*, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938 (1922). Due process requires a fair hearing in both types of cases, *Kwock Jan Fat v. White*, 253 U.S. 454, 40 S.Ct. 566, 64 L.Ed. 1010 (1920); *U. S. ex rel. Tisi v. Tod*, 264 U.S. 131, 44 S.Ct. 260, 68 L.Ed. 590 (1924).

2. See T. R. Powell, *Judicial Review of Administrative Action in Immigration Proceedings*, 22 *Harv.L.Rev.* 360 (1909); Note, *Right of an Alien to a Fair Hearing in Exclusion Proceedings*, 41 *Harv.L.Rev.* 522 (1928); Note, *Due Process Restrictions on Procedure in Alien Exclusion and Deportation Cases*, 31 *Col.L.Rev.* 1013 (1931).

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#### MILLIKEN v. MEYER.

Supreme Court of the United States, 1940.  
311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278.

Mr. Justice DOUGLAS delivered the opinion of the Court.

The Colorado Supreme Court held null and void a judgment of the Wyoming court against the claim of Milliken that that judgment was entitled to full faith and credit under the Federal Constitution. 101 Colo. 564, 76 P.2d 420; 105 Colo. 532, 100 P.2d 151. The case is here on a petition for certiorari which we granted, 310 U.S. 622, 60 S.Ct. 1099, 84 L.Ed. 1395, because of the substantial character of the federal question which is raised.

The controversy is over a 1/64th interest in profits from operation of certain Colorado oil properties. Transcontinental on August 31, 1922, contracted to pay Meyer 4/64ths of those profits. Milliken asserted a claim to a two-thirds interest in that 4/64ths share. As a settlement of that dispute Transcontinental on May 3, 1924, contracted to pay Milliken a 2/64ths interest and Milliken assigned to Transcontinental all his claims against Meyer pertaining to the lands in question and to Meyer's 4/64ths interest in the profits.

Later Milliken instituted suit in the Wyoming court alleging a joint adventure with Transcontinental and Meyer and charging a conspiracy on their part to defraud him of his rights. He

sought a cancellation of the contracts of May 3, 1924, and an accounting from Transcontinental and Meyer. Meyer, who was asserted to be a resident of Wyoming, was personally served with process in Colorado pursuant to the Wyoming statutes; but he made no appearance in the Wyoming cause. Transcontinental appeared and answered. The court found that there was no joint venture between Milliken and Transcontinental; that the contracts of May 3, 1924, were valid; and that the action against Transcontinental should be dismissed with prejudice. It found, however, that there was a joint venture between Milliken and Meyer; that they were entitled to share equally in 6/64ths of the net profits; and that, while Meyer had regularly received 4/64ths, he had refused to account to Milliken for his 1/64th part. The court did not purport to decree the 1/64th interest to Milliken or anyone else but entered an in personam judgment against Meyer for the profits which Meyer had withheld from Milliken, together with interest thereon; and enjoined Transcontinental from paying and Meyer from receiving, more than 3/64ths of the net profits. This was on July 11, 1931. Thereafter the 1/64th share was withheld from Meyer and paid over to Milliken. In 1935 respondent instituted this suit in the Colorado court praying, inter alia, for a judgment against Milliken for the sums withheld under the Wyoming judgment and paid to Milliken, for an injunction against Milliken attempting to enforce the Wyoming judgment, and for a decree that the Wyoming judgment was a nullity for want of jurisdiction over Meyer or his property. The bill alleged, inter alia, that Meyer at the time of service in the Wyoming court had long ceased to be a resident of Wyoming and was a resident of Colorado; that the service obtained on him did not give the Wyoming court jurisdiction of his person or property; and that such judgment was violative of the due process clause of the Fourteenth Amendment. Milliken's answer alleged, inter alia, that Meyer was a resident of Wyoming at the time of the Wyoming action and that the Wyoming judgment was entitled to full faith and credit in Colorado under the Federal Constitution. Article 4, § 1. The Colorado court, on issues joined, found that Meyer was domiciled in Wyoming when the Wyoming suit was commenced, that the Wyoming statutes for substituted service were constitutional, that the affidavit for constructive service on Meyer was filed in good faith, substantially conformed to the Wyoming statute and stated the truth, that Wyoming had jurisdiction over the person of Meyer, that the Wyoming decree was not void, and that the bill should be dismissed.

That judgment was reversed by the Supreme Court of Colorado. It did not pass on the question of whether or not the Wyoming court had jurisdiction of the parties and subject matter. It held

that the Wyoming decree was void on its face because of an irreconcilable contradiction between the findings and the decree. In its view the finding of the Wyoming court that Milliken's assignment of May 3, 1924, to Transcontinental of his claims against Meyer was valid, deprived the court of any ground upon which it could predicate a judgment against Meyer, since the only basis for an action by Milliken against Meyer rested upon the claim before its assignment.

Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is of course open to inquiry. *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U.S. 287, 11 S.Ct. 92, 34 L.Ed. 670; *Adam v. Saenger*, 303 U.S. 59, 58 S.Ct. 454, 82 L.Ed. 649. But if the judgment on its face appears to be a "record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself." *Adam v. Saenger*, supra, 303 U.S. at page 62, 58 S.Ct. at page 456, 82 L.Ed. 649. In such case the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based. *Fauntleroy v. Lum*, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039; *Roche v. McDonald*, 275 U.S. 449, 48 S.Ct. 142, 72 L.Ed. 365, 53 A.L.R. 1141; *Titus v. Wallick*, 306 U.S. 282, 59 S.Ct. 557, 83 L.Ed. 653. Whatever mistakes of law may underlie the judgment (*Cooper v. Reynolds*, 10 Wall. 308, 19 L.Ed. 931) it is "conclusive as to all the media concludendi". *Fauntleroy v. Lum*, supra, 210 U.S. at page 237, 28 S.Ct. at page 643, 52 L.Ed. 1039.

Accordingly, if the Wyoming court had jurisdiction over Meyer, the holding by the Colorado Supreme Court that the Wyoming judgment was void because of an inconsistency between the findings and the decree was not warranted.

On the findings of the Colorado trial court, not impaired by the Colorado Supreme Court, it is clear that Wyoming had jurisdiction over Meyer in the 1931 suit. Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. Substituted service in such cases has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state (*Huntley v. Baker*, 33 Hun, N.Y., 578; *Hurlbut v. Thomas*, 55 Conn. 181, 10 A. 556, 3 Am.St.Rep. 43; *Harryman v. Roberts*, 52 Md. 64) as well as where he was personally served without the state. In *re Hendrickson*, 40 S.D. 211, 167 N.W. 172. That such substituted service may be wholly adequate to meet the requirements of due

process was recognized by this Court in *McDonald v. Mabree*, 243 U.S. 90, 37 S.Ct. 343, 61 L.Ed. 608, L.R.A.1917F, 458, despite earlier intimations to the contrary. See *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L.Ed. 565; *Burdick, Service as a Requirement of Due Process in Actions in Personam*, 20 Mich.L.Rev. 422. Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice (*McDonald v. Mabree*, supra) implicit in due process are satisfied. Here there can be no question on that score. Meyer did not merely receive actual notice of the Wyoming proceedings. While outside the state, he was personally served in accordance with a statutory scheme which Wyoming had provided for such occasions. And in our view the machinery employed met all the requirements of due process. Certainly then Meyer's domicile in Wyoming was a sufficient basis for that extra-territorial service. As in case of the authority of the United States over its absent citizens (*Blackmer v. United States*, 284 U.S. 421, 52 S.Ct. 252, 76 L.Ed. 375), the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. "Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable" from the various incidences of state citizenship. \* \* \* The responsibilities of that citizenship arise out of the relationship to the state which domicile creates. That relationship is not dissolved by mere absence from the state. The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence in the state. One such incidence of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him. See *Restatement, Conflict of Laws*, §§ 47, 79; *Dodd, Jurisdiction in Personal Actions*, 23 Ill.L.Rev. 427. Here such a reasonable method was so provided and so employed.

Reversed.

#### NOTE

1. See E. M. Dodd, *Jurisdiction in Personal Actions*, 23 Ill.L. Rev. 427 (1923); C. K. Burdick, *Service as a Requirement of Due Process in Actions in Personam*, 20 Mich.L.Rev. 422 (1922).

2. There are certain circumstances in which a person may be bound by a judgment against others; see *Converse v. Hamilton*, 224 U.S. 243, 32 S.Ct. 415, 56 L.Ed. 749 (1912); *Selig v. Hamilton*, 234 U.S. 652, 34 S.Ct. 926, 58 L.Ed. 1518 (1914); and other circumstances under which due process prohibits such a result; *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940).

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### H. L. DOHERTY & CO. v. GOODMAN.

Supreme Court of the United States, 1935. 294 U.S. 623, 55 S.Ct. 553,  
79 L.Ed. 1097.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

In 1926, Henry L. Doherty, citizen of New York, trading as Henry L. Doherty & Co., established an office at Des Moines, Polk county, Iowa, and there through agents carried on the business of selling corporate securities throughout the state. E. A. King, designated as district manager, took charge of this office in January, 1929, and continued to direct its affairs during the time here important. Under him were clerks and stock salesmen, paid directly from New York.

A salesman operating from the Des Moines office, September 1, 1929, negotiated in that city a sale of stock to appellee Goodman, and out of this the present controversy arose. The only power or authority expressly conferred upon King by Doherty was to sell securities and supervise other employees; he never in terms consented that service of process upon this agent should constitute service upon himself.

Section 11079, Iowa Code 1927, also 1931, in effect since 1851, provides: "When a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

July 31, 1931, appellee Goodman commenced an action against Doherty in the District Court, Polk county, wherein he sought only a personal judgment for damages arising out of the sale contract of September 1, 1929. The usual summons or notice commanding the defendant to appear was served upon district manager King.

Doherty appeared specially. He challenged the jurisdiction of the court; claimed he had not been within the state; King had no authority to accept service of process in his behalf; the

alleged service was ineffective; and that to hold otherwise would deprive him of rights guaranteed by the Federal Constitution. The District Court, relying upon Code, § 11079, overruled the special plea and held the service adequate. Doherty made no further appearance. Judgment against him was affirmed by the Supreme Court, 218 Iowa, 529, 255 N.W. 667.

The cause is here by appeal. Appellant insists that, if construed as applicable to him, a citizen of another state never in Iowa, in the circumstances disclosed by the record, section 11079 offends the Federal Constitution, section 2, art. 4, and section 1, Fourteenth Amendment, U.S.C.A.Const. art. 4, § 2, and Amend. 14, § 1.

The Supreme Court affirmed the action of the trial court upon authority of *Davidson v. Henry L. Doherty & Co.*, 1932, 214 Iowa, 739, 241 N.W. 700, 701, 91 A.L.R. 1308. The opinion in that cause construed section 11079, and, among other things, said:

"By its terms, and under our holding, the statute is applicable to residents of 'any other county' than that in which the principal resides, whether such county be situated in Iowa or in some other state. In other words, the statute does apply to nonresidents of Iowa who come within its terms and provisions, as well as to residents. Our construction of the statute has stood since 1887. \* \* \* We adhere to our former holdings that the statute is applicable to individual nonresidents who come within its express terms and provisions. \* \* \*

"The statute in question does not in any manner abridge the privileges or immunities of citizens of the several states. It treats residents of Iowa exactly as it treats residents of all other states. The citizens of each state of the United States are, under this statute, entitled to all the privileges and immunities accorded citizens of this state.

"The justice of such a statute is obvious. It places no greater or different burden upon the nonresident than upon the resident of this state. \* \* \* A nonresident who gets all the benefit of the protection of the laws of this state with regard to the office or agency and the business so transacted ought to be amenable to the laws of the state as to transactions growing out of such business upon the same basis and conditions as govern residents of this state. \* \* \* 'It makes no hostile discrimination against nonresidents, but tends to put them on the same footing as residents.' \* \* \*

"Four things are under this statute essential to the validity of such service. The defendant must: (1) Have an office or

agency in the county. (2) A county other than that in which he resides. (3) The action must grow out of or be connected with the business of that office or agency. (4) The agent or clerk upon whom service is made must be employed in such office or agency. \* \* \*

“When a nonresident defendant establishes an office or agency for the transaction of business in any county in this state under this statute, he thereby voluntarily appoints his own agent, in charge of said office or agency, as one upon whom substituted service in actions in personam, growing out of that office or agency, may be made. \* \* \* ‘Under our statute, the implied consent to be sued in this state is limited to proceedings growing out of the business transacted through the office or agency in this state.’ It is required that the agent shall actually receive a copy of the notice of suit and that it shall be read to him. \* \* \* The action must grow out of the business of that very agency. Ample time is given the defendant to appear and defend; there is not only ‘reasonable probability,’ but practical moral certainty, that the defendant will receive actual notice of the pendency of the action.”

Iowa treats the business of dealing in corporate securities as exceptional, and subjects it to special regulation. Laws 1913, c. 137; Laws 1921, c. 189; Laws 1929, c. 10, approved Mar. 19, 1929. The last-cited act requires registration and written consent for service of process upon the secretary of state. See *Merrick v. N. W. Halsey & Co.*, 242 U.S. 568, 37 S.Ct. 227, 61 L.Ed. 498. Doherty voluntarily established an office in Iowa and there carried on this business. Considering this fact, and accepting the construction given to section 11079, we think to apply it as here proposed will not deprive him of any right guaranteed by the Federal Constitution.

*Flexner v. Farson*, 248 U.S. 289, 39 S.Ct. 97, 63 L.Ed. 250, much relied upon, does not sustain appellant's position. There the service was made upon one not then agent for the defendants; here the situation is different. King was manager of the appellant's office when the sale contract was made; also when process was served upon him. Moreover, under the laws of Iowa, neither her citizens nor nonresidents could freely engage in the business of selling securities.

The power of the states to impose terms upon nonresidents, as to activities within their borders, recently has been much discussed. *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091; *Wuchter v. Pizzutti*, 276 U.S. 13, 48 S.Ct. 259, 260, 72 L.Ed. 446, 57 A.L.R. 1230; *Young v. Masci*, 289 U.S. 253, 53 S.Ct. 599, 77 L.Ed. 1158, 88 A.L.R. 170. Under these opinions it is es-

established doctrine that a state may rightly direct that nonresidents who operate automobiles on her highways shall be deemed to have appointed the secretary of state as agent to accept service of process, provided there is some "provision making it reasonably probable that notice of the service on the secretary will be communicated to the nonresident defendant who is sued."

So far as it affects appellant, the questioned statute goes no farther than the principle approved by those opinions permits. Only rights claimed upon the present record are determined. The limitations of section 11079 under different circumstances we do not consider.

Affirmed.

#### NOTE

1. See M. S. Culp, *Process in Actions against Non-Residents Doing Business within a State*, 32 Mich.L.Rev. 909 (1934); A. W. Scott, *Jurisdiction over Non-Residents Doing Business within a State*, 32 Harv.L.Rev. 871 (1919).

2. As to what due process requires with respect to service upon non-resident motorists with respect to causes of action arising out of their operation of motor vehicles over state's highways, see *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927); *Wuchter v. Pizzutti*, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446 (1928). See A. W. Scott, *Jurisdiction over Non-Resident Motorists*, 39 Harv.L.Rev. 563 (1926); M. S. Culp, *Process in Actions against Non-Resident Motorists*, 32 Mich.L.Rev. 325 (1934).

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#### INTERNATIONAL SHOE COMPANY v. STATE OF WASHINGTON, ETC.

Supreme Court of the United States, 1945.  
326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95.

Mr. Chief Justice STONE delivered the opinion of the Court.

The questions for decision are (1) whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund exacted by state statutes, Washington Unemployment Compensation Act, Washington Revised Statutes, § 9998—103a through § 9998—123a, 1941 Supp., and (2) whether the state can exact those contributions consistently with the due process clause of the Fourteenth Amendment.

The statutes in question set up a comprehensive scheme of unemployment compensation, the costs of which are defrayed by contributions required to be made by employers to a state unemployment compensation fund. The contributions are a specified percentage of the wages payable annually by each employer for his employees' services in the state. The assessment and collection of the contributions and the fund are administered by respondents. Section 14(c) of the Act, Wash.Rev.Stat. 1941 Supp., § 9998—114c, authorizes respondent Commissioner to issue an order and notice of assessment of delinquent contributions upon prescribed personal service of the notice upon the employer if found within the state, or, if not so found, by mailing the notice to the employer by registered mail at his last known address. That section also authorizes the Commissioner to collect the assessment by distraint if it is not paid within ten days after service of the notice. By §§ 14(e) and 6(b) the order of assessment may be administratively reviewed by an appeal tribunal within the office of unemployment upon petition of the employer, and this determination is by § 6(i) made subject to judicial review on questions of law by the state Superior Court, with further right of appeal in the state Supreme Court as in other civil cases.

In this case notice of assessment for the years in question was personally served upon a sales solicitor employed by appellant in the State of Washington, and a copy of the notice was mailed by registered mail to appellant at its address in St. Louis, Missouri. Appellant appeared specially before the office of unemployment and moved to set aside the order and notice of assessment on the ground that the service upon appellant's salesman was not proper service upon appellant; that appellant was not a corporation of the State of Washington and was not doing business within the state; that it had no agent within the state upon whom service could be made; and that appellant is not an employer and does not furnish employment within the meaning of the statute.

The motion was heard on evidence and a stipulation of facts by the appeal tribunal which denied the motion and ruled that respondent Commissioner was entitled to recover the unpaid contributions. That action was affirmed by the Commissioner; both the Superior Court and the Supreme Court affirmed. 154 P.2d 801. Appellant in each of these courts assailed the statute as applied, as a violation of the due process clause of the Fourteenth Amendment, and as imposing a constitutionally prohibited burden on interstate commerce. The cause comes here on appeal under § 237(a) of the Judicial Code, 28 U.S.C. § 344(a), 28 U.S.C.A. § 344(a), appellant assigning as error that the challenged statutes

as applied infringe the due process clause of the Fourteenth Amendment and the commerce clause.

The facts as found by the appeal tribunal and accepted by the state Superior Court and Supreme Court, are not in dispute. Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri, and is engaged in the manufacture and sale of shoes and other footwear. It maintains places of business in several states, other than Washington, at which its manufacturing is carried on and from which its merchandise is distributed interstate through several sales units or branches located outside the State of Washington.

Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in that state and makes there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales. The commissions for each year totaled more than \$31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals is reimbursed by appellant.

The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant's office in St. Louis for acceptance or rejection, and when accepted the merchandise for filling the orders is shipped f.o.b. from points outside Washington to the purchasers within the state. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections.

The Supreme Court of Washington was of opinion that the regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product into the state, was sufficient to constitute doing business in the state so as to make appellant amenable to suit in its courts. But it was also of opinion that there were sufficient additional activities shown to bring the case within the rule frequently

stated, that solicitation within a state by the agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there. *International Harvester Co. v. Kentucky*, 234 U.S. 579, 587, 34 S.Ct. 944, 946, 58 L.Ed. 1479; *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79, 87, 38 S.Ct. 233, 235, 62 L.Ed. 587, Ann. Cas.1918C, 537; *Frene v. Louisville Cement Co.*, 77 U.S.App.D.C. 129, 134 F.2d 511, 516, 146 A.L.R. 926. The court found such additional activities in the salesmen's display of samples sometimes in permanent display rooms, and the salesmen's residence within the state, continued over a period of years, all resulting in a substantial volume of merchandise regularly shipped by appellant to purchasers within the state. The court also held that the statute as applied did not invade the constitutional power of Congress to regulate interstate commerce and did not impose a prohibited burden on such commerce.

Appellant's argument, renewed here, that the statute imposes an unconstitutional burden on interstate commerce need not detain us. For 53 Stat. 1391, 26 U.S.C. § 1606(a), 26 U.S.C.A. Int. Rev.Code, § 1606(a), provides that "No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce." It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it. \* \* \*

Appellant also insists that its activities within the state were not sufficient to manifest its "presence" there and that in its absence the state courts were without jurisdiction, that consequently it was a denial of due process for the state to subject appellant to suit. It refers to those cases in which it was said that the mere solicitation of orders for the purchase of goods within a state, to be accepted without the state and filled by shipment of the purchased goods interstate, does not render the corporation seller amenable to suit within the state. \* \* \* And appellant further argues that since it was not present within the state, it is a denial of due process to subject it to taxation or other money exaction. It thus denies the power of the state to lay the tax or to subject appellant to a suit for its collection.

Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdic-

tion of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L.Ed. 565. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." \* \* \*

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, *Klein v. Board of Tax Supervisors*, 282 U.S. 19, 24, 51 S.Ct. 15, 16, 75 L.Ed. 140, 73 A.L.R. 679, it is clear that unlike an individual its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far "present" there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. L. Hand, J., in *Hutchinson v. Chase & Gilbert*, 2 Cir., 45 F.2d 139, 141. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection. *Hutchinson v. Chase & Gilbert*, supra, 45 F.2d 141.

"Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. \* \* \* Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. \* \* \* To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.

While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, \* \* \* there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. \* \* \*

Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit. \* \* \* True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. \* \* \* But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction. \* \* \*

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. *St. Louis S. W. R. Co. v. Alexander*, supra, 227 U.S. 228, 33 S.Ct. 248, 57 L.Ed. 486, Ann.Cas.1915B, 77; *International Harvester Co. v. Kentucky*, supra, 234 U.S. 587, 34 S.Ct. 946, 58 L.Ed. 1479. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. \* \* \*

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. \* \* \*

Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.

We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's "presence" there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual. \* \* \* Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit. \* \* \*

Affirmed.

Mr. Justice BLACK delivered a separate opinion.

#### NOTE

1. For other cases considering the problem of service upon foreign corporations doing business within a state, see *Riverside & Dan River Cotton Mills v. Menafee*, 237 U.S. 189, 35 S.Ct. 579, 59 L.Ed. 910 (1915). *Pennsylvania Fire Ins. Co. v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93, 37 S.Ct. 344, 61 L.Ed. 610 (1917). *Old Wayne Mut. Life Ins. Ass'n v. McDonough*, 204 U.S. 8, 27 S.Ct. 236, 51 L. Ed. 345 (1907); *Washington ex rel. Bond & Goodwin & Trucker v. Superior Court of Washington for Spokane County*, 289 U.S. 361, 53 S.Ct. 624, 77 L.Ed. 1256 (1933).

2. See J. P. Bullington, *Jurisdiction over Foreign Corporations*, 6 No.Car.L.Rev. 147 (1928); P. E. Farrier, *Jurisdiction over Foreign Corporations*, 17 Minn.L.Rev. 270 (1933); J. L. Rothschild, *Jurisdiction of Foreign Corporations in Personam*, 17 Va.L.Rev. 129 (1930); J. P. McBaine, *Jurisdiction over Foreign Corporations: Actions Arising out of Acts Done within the Form*, 34 Calif.L.Rev. 331 (1946).

## PENNINGTON v. FOURTH NAT. BANK OF CINCINNATI.

Supreme Court of the United States, 1917. 243 U.S. 269, 37 S.Ct. 282,  
61 L.Ed. 713, L.R.A.1917F, 1159.

Mr. Justice BRANDEIS delivered the opinion of the Court:

Mrs. Pennington obtained in a state court of Ohio a decree of divorce which is admitted to be valid. In the same proceeding she sought alimony; and in order to insure its payment joined as a defendant the Fourth National Bank of Cincinnati, in which her husband had a deposit account. When the suit was filed the court entered a preliminary order enjoining the bank from paying out any part of the deposit. Under later orders of the court the bank made payments from it to the wife. Finally it was perpetually enjoined from making any payment to the husband, and ordered to pay the balance to the wife, which it did. The husband then presented to the bank a check for the full amount of the deposit, asserting that the court's orders deprived him of his property without due process of law, in violation of the 14th Amendment, U.S.C.A.Const. Amend. 14, and were void; since he was a nonresident of Ohio, had not been personally served with process within the state, had not voluntarily appeared in the suit, and had been served by publication only, all of which the bank knew. Payment of the check was refused. Thereupon Pennington brought, in another state court of Ohio, an independent action against the bank for the amount. Judgment being rendered for the bank, he took the case by writ of error to the court of appeals for Hamilton county, and from there to the supreme court of Ohio. Both these courts affirmed the judgment below. Then the case was brought to this court for review, Pennington still claiming that his constitutional rights had been violated.

The 14th Amendment did not, in guarantying due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a nonresident—of which bank deposits are an example—is property within the state. *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U.S. 710, 19 S.Ct. 797, 43 L.Ed. 1144. It is, indeed, the species of property which courts of the several states have most frequently applied in satisfaction of the obligations of absent debtors. *Harris v. Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023, 3 Ann.Cas. 1084. Substituted service on a nonresident by publication furnishes no legal basis for a judgment in personam. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565. But garnishment or foreign attachment is a proceeding quasi in rem. *Freeman v. Alderson*, 119

U.S. 185, 187, 7 S.Ct. 165, 30 L.Ed. 372, 373. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power.

It is asserted that these settled principles of law cannot be applied to enforce the obligation of an absent husband to pay alimony, without violating the constitutional guaranty of due process of law. The main ground for the contention is this: In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is, in this connection, without legal significance. The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt,—that is, it will be valid not in personam, but as a charge to be satisfied out of the property seized.

The objection that this proceeding was void, because there was no seizure of the res at the commencement of the suit, is also unfounded. The injunction which issued against the bank was as effective a seizure as the customary garnishment or taking on trustee process. Such equitable process is frequently resorted to in order to reach and apply property which cannot be attached at law.

Affirmed.

#### NOTE

1. See also *Security Savings Bank v. California*, 263 U.S. 282, 44 S.Ct. 108, 68 L.Ed. 301 (1922); *Blackmer v. U. S.*, 284 U.S. 421, 52 S.Ct. 252, 76 L.Ed. 375 (1932).

2. As to the requisites of due process in proceedings in rem, see *American Land Co. v. Zeiss*, 219 U.S. 47, 31 S.Ct. 200, 59 L.Ed. 82

(1911); *Anderson Nat. Bank v. Lueckett*, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692 (1944); cf. with last case *First Nat. Bank v. California*, 262 U.S. 366, 43 S.Ct. 602, 67 L.Ed. 1030 (1923), and *National City Bank v. Philippine Islands*, 302 U.S. 651, 58 S.Ct. 269, 83 L.Ed. 504 (1938).

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OWNBEY v. MORGAN

Supreme Court of the United States, 1921.  
256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837.

Mr. Justice PITNEY delivered the opinion of the Court.

This writ of error brings under review a judgment of the Supreme Court of the state of Delaware, affirming a judgment of the Superior Court in a proceeding brought by defendants in error by foreign attachment against the property of plaintiff in error pursuant to the statutes of that state.

Proceedings were commenced in the Superior Court December 23, 1915, by the filing of an affidavit entitled in the cause, made by one Joyce, a credible person, and setting forth that defendant Ownbey resided out of the state and was justly indebted to plaintiffs in a sum exceeding \$50. Thereupon a writ of foreign attachment was issued to the sheriff of New Castle county, which plaintiffs caused to be indorsed with a memorandum to the effect that special bail was required in the sum of \$200,000, and under which the sheriff attached 33,324½ shares of stock (par value \$5 each) held and owned by defendant in the Wootten Land & Fuel Company, a Delaware corporation, and made a proper return. Plaintiffs filed a declaration demanding recovery of \$200,000, counting upon a combination of the common money counts in *assumpsit*. Whether such pleading was required or even permitted by the statutes is questionable; but this is not material for present purposes. Not long afterwards, defendant, by attorneys, without giving security, went through the form of entering a general appearance, and filed pleas of non *assumpsit*, the statute of limitations, and payment. Plaintiffs' attorneys moved to strike out the appearance and pleas on the ground that special bail or security as required by the statute in suits instituted by attachment had not been given. To this motion defendant filed a written response setting up that the Wootten Land & Fuel Company, although a Delaware cor-

poration, was engaged in coal mining and all its other activities and business in the states of Colorado and New Mexico, where it had large and valuable property; that defendant was a resident of Colorado, and the stock in said company attached in this case constituted substantially all his property; that the company was in the hands of a receiver, and because of this the market value of the shares attached was temporarily destroyed, so that they were unavailable for use in obtaining the required bail or security to procure the discharge of the shares from attachment, and that it was impossible for defendant to secure bail or security in the sum of \$200,000, or any adequate sum, for the release of the shares so attached; that defendant had a good defense, in that there was no indebtedness upon any account or in any sum due from him to plaintiffs; that by the true construction of the Delaware statutes the entry of bail or security for the discharge of the property attached was not a necessary prerequisite to the entry of defendant's appearance, and such appearance might be made without disturbing the seizure of property under the writ or its security for any judgment finally entered; and that if the statutes could not be so construed as to permit appearance and defense in a case begun by foreign attachment without the entry of bail or security for the discharge of the property seized, they were unconstitutional under the first section of the Fourteenth Amendment, in that (a) they abridged the privileges and immunities of citizens of the United States; (b) deprived defendants in cases brought under them of property without due process of law; and (c) denied to such defendants the equal protection of the laws.

Upon motion of plaintiffs this response and the attempted appearance and pleas of defendant were struck out upon the ground that special bail or security as required by the statute had not been given by defendant or any person for him; the court in banc holding that in a foreign attachment suit against an individual there could be no appearance without entering "special bail," that the requirement to that effect was not arbitrary or unreasonable, and the statute was not unconstitutional. *Morgan v. Ownbey*, 29 Del.(6 Boyce) 379, 398-406, 100 A. 411.

Thereupon judgment in favor of plaintiffs and against defendant for want of appearance was ordered, collectible only from the property attached, the amount to be ascertained by inquisition at bar. The inquisition afterwards proceeded, and resulted in the finding of damages to the amount of \$200,168.57, for which final judgment was entered.

Defendant repeatedly asked that the proceedings be opened and he be permitted to appear and disprove or avoid plaintiffs' debt or claim, saying that shortly after the issuance of the writ of attachment, and as soon as advised thereof, he had proceeded to Delaware, retained counsel, and used every possible effort to secure bail in the sum of \$200,000, offering the attached stock as collateral security to indemnify a surety, but because the property of the Wootten Company was in the hands of a receiver he had found it impossible to obtain any surety; and that he was not at present nor was he at the time of the issuance of the writ of foreign attachment indebted to plaintiffs in any sum whatever, but had a just and legal defense to the whole of the alleged cause of action. These applications were denied, upon opinions of the court in banc (29 Del.[6 Boyce] 417, 434-436, 100 A. 411), and the Superior Court ordered the shares of stock in question sold in order to satisfy the debt, interest, and costs.

The Supreme Court affirmed the judgment (7 Boyce, 297, 105 A. 838, 849), and the case comes here upon the contention that the statutes of Delaware, as thus construed and applied, are repugnant to the first section of the Fourteenth Amendment.

\* \* \*

The principal contention is based upon the "due process of law" clause of the Fourteenth Amendment. It is said the essential element of due process—the right to appear and be heard in defense of the action—is lacking. But the statute in plain terms gives to defendant the opportunity to appear and make his defense, conditioned only upon his giving security to the value of the property attached. Hence the question reduces itself to whether this condition is an arbitrary and unreasonable requirement, so inconsistent with established modes of administering justice that it amounts to a denial of due process. And this must be determined not alone with reference to a case of peculiar hardship arising out of exceptional circumstances, but with respect to the general effect and operation of the system of procedure established by the statutes. \* \* \*

It will be seen that from the beginning the giving of security, either in the form of special bail or a substituted undertaking for the payment of the judgment, has been made a condition precedent to the entering of appearance and making defense upon the merits by a nonresident individual defendant whose property was taken under foreign attachment. In the present case the court in banc called attention to the hardship occasionally arising from this, and suggested that the Legislature provide a remedy. *Morgan v. Ownbey*, 29 Del.(6 Boyce) 435, 100 A. 411. There followed an amendatory act of March 23, 1917 (29 Del.

Laws, 844, c. 258), permitting an appearance and defense without the giving of special security, but leaving the lien upon the property attached to remain as security pro tanto, which was made to apply, subject to conditions, to all suits instituted (as this one was) after January 1, 1915. Whether plaintiff in error was at liberty to avail himself of this statute we are not advised; and for present purposes it will be disregarded.

The courts of Delaware at all times have laid emphasis upon the difference between the original character of a suit by foreign attachment treating it as an *ex parte* proceeding quasi in rem, looking to a judgment of condemnation against the property attached and having the incidental object of compelling defendant's appearance, on the one hand, and the action in personam, with its appropriate incidents, that resulted from an appearance by defendant accompanied by the giving of security, on the other. *Wells v. Shreve's Administrator* (1861) 2 Houst. 329, 369-370; *Frankel v. Satterfield* (1890) 9 Houst. 201, 209, 19 A. 898; *Nat. Bank of W. & B. v. Furtick* (1895) 2 Marv. 35, 51, 42 A. 479, 44 L.R.A. 115, 69 Am.St.Rep. 99. Recognizing the fundamental character of this distinction, and regarding the foreign attachment in Delaware as wholly statutory, the courts have not felt at liberty, in the absence of legislation, to give to the proceeding a hybrid character by permitting an appearance without security other than the property attached, leaving this to answer pro tanto the plaintiff's demand.

The requirement of special bail as a condition of appearance was long familiar in bailable actions at common law and in admiralty proceedings. In requiring such bail from a nonresident defendant whose goods had been seized and who desired to be heard to contest the plaintiff's demand, Delaware did but follow familiar precedents and analogies, besides conforming to the custom. It is not contended that the substitution, by the 1877 amendment, of a bond conditioned for payment of the judgment to the extent of the value of the property attached, in lieu of the special bail formerly required on entering appearance, made a substantial difference rendering the new requirement any more obnoxious to the due process clause than the earlier. It is the imposing of any condition whatever upon the right to be heard that is complained of.

Hence the question is whether the state in thus adopting a time-honored method of procedure and preserving as a part of it a time-honored requirement of security, and in adhering logically to the ancient distinction between a proceeding quasi in rem and an action in personam, to the extent of refraining, un-

til the amendment of 1917, from enacting legislation recognizing the peculiar appeal of a defendant who may have no resources or credit aside from the property attached, must be regarded as having deprived such a defendant of his property without due process of law, in contravention of the Fourteenth Amendment. In our opinion, the question must be answered in the negative.

In *Murray's Lessee v. Hoboken Land & Imp. Co.*, 18 How. 272, 276, 280, 15 L.Ed. 372, which arose under the due process clause of the Fifth Amendment, the court, by Mr. Justice Curtis, declared (18 How. 276, 277, 15 L.Ed. 372):

"The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. \* \* \* To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

In *Pennoyer v. Neff*, 95 U.S. 714, 722-724, 24 L.Ed. 565, it was shown that the process of foreign attachment has its fundamental basis in the exclusive jurisdiction and sovereignty of each state over persons and property within its borders; and although emphasis was there laid upon the authority and duty of a state to protect its own citizens in their claims against non-resident owners of property situate within the state, it is clear that, by virtue of the "privileges and immunities" clause of section 2 of article 4 of the Constitution, each state is at liberty, if not under a duty, to accord the same privilege of protection to creditors who are citizens of other states that it accords to its own citizens. *Blake v. McClung*, 172 U.S. 239, 248 et seq., 19 S.Ct. 165, 43 L.Ed. 432.

The record before us shows no judgment entered against plaintiff in error in personam, but only one for carrying into effect a lien imposed upon his interest in property within the jurisdiction of the state for the purpose of satisfying a demand made against him as a nonresident debtor, and established to the satisfaction of the court. And an analysis of his contentions shows that the real complaint was and is, not that there was any departure, arbitrary or otherwise, from the due and

orderly course of procedure provided by the statutes of Delaware long before the case arose, but rather that the courts of the state declined to recognize the peculiar hardship of his case as sufficient ground for relaxing in his behalf the established legal procedure. His appeal in effect was to the summary and equitable jurisdiction of a court of law so to control its own process and proceedings as not to produce hardship. This is a recognized extraordinary jurisdiction of common-law courts, distinguishable from their ordinary or formal jurisdiction. It has been much developed since the separation of the American colonies from England. But where the proceedings have been regular, it is exercised as a matter of grace or discretion, not as of right, and is characterized by the imposition of terms on the party to whom concession is made. *Smith's Action at Law* (4th Ed. 1851) pp. 22-27; *Stewart's Blackstone* (1854) vol. 3, pp. 334-338. A liberal exercise of this summary and equitable jurisdiction, in the interest of substantial justice and in relaxation of the rigors of strict legal practice, is to be commended; but it cannot be said to be essential to due process of law, in the constitutional sense.

The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings. But a property owner who absents himself from the territorial jurisdiction of a state, leaving his property within it, must be deemed *ex necessitate* to consent that the state may subject such property to judicial process to answer demands made against him in his absence, according to any practicable method that reasonably may be adopted. A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the states as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, even if it be taken with its ancient incident of requiring security from a defendant who after seizure of his property comes within the jurisdiction and seeks to interpose a defense. The condition imposed has a reasonable relation to the conversion of a proceeding quasi in rem into an action in personam; ordinarily it is not difficult to comply with—a man who has property usually has friends and credit—and hence in its normal operation it must be regarded as a permissible condition; and it cannot be deemed so arbitrary as to render the procedure in-

consistent with due process of law when applied to a defendant who, through exceptional misfortune, is unable to furnish the necessary security; certainly not where such defendant, as is the case now presented, so far as the record shows, has acquired the property right and absented himself from the state after the practice was established, and hence with notice that his property situate there would be subject to disposition under foreign attachment by the very method that afterwards was pursued, and that he would have no right to enter appearance and make defense except upon giving security.

However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform. For instance, it does not constrain the states to accept particular modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammelled liberty to make amendments. Neither does it, as we think, require a state to relieve the hardship of an ancient and familiar method of procedure by dispensing with the exaction of special security from an appearing defendant in foreign attachment.

We conclude that the statutes under consideration were not in conflict with the due process provision of the Fourteenth Amendment. \* \* \*

Affirmed.

#### NOTE

1. See Note, Power to Strike Out a Pleading—Due Process of Law, 10 Cornell L.Quar. 234 (1925); F. R. Black, *Ownbey v. Morgan*—A Judicial Mile Post on the Road to Absolutism, 22 Ky.L.Jour. 69 (1933).

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#### BALTIMORE & CAROLINA LINE, INC. v. REDMAN.

Supreme Court of the United States, 1935. 295 U.S. 654, 55 S.Ct. 890,  
79 L.Ed. 1636.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This was an action in a federal court in New York to recover damages for personal injuries allegedly sustained by the plaintiff through the defendant's negligence. The issues were tried before the court and a jury. At the conclusion of the evidence, the defendant moved for a dismissal of the complaint because the evi-

dence was insufficient to support a verdict for the plaintiff, and also moved for a directed verdict in its favor on the same ground. The court reserved its decision on both motions, submitted the case to the jury subject to its opinion on the questions reserved, and received from the jury a verdict for the plaintiff. No objection was made to the reservation or this mode of proceeding. Thereafter the court held the evidence sufficient and the motions ill grounded, and accordingly entered a judgment for the plaintiff on the verdict.

The defendant appealed to the Circuit Court of Appeals, which held the evidence insufficient and reversed the judgment with a direction for a new trial. The defendant urged that the direction be for a dismissal of the complaint. But the Court of Appeals ruled that under our decision in *Slocum v. New York Life Insurance Company*, 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879, Ann.Cas. 1914D, 1029, the direction must be for a new trial. We granted a petition by the defendant for certiorari because of the last ruling, and at the same time denied a petition by the plaintiff challenging the ruling on the insufficiency of the evidence.

The Seventh Amendment to the Constitution, U.S.C.A.Const. Amend. 7, prescribes:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted. The amendment not only preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of re-examination existing under the common law, and to that end declares that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The aim of the amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.

In *Slocum v. New York Life Insurance Company*, a jury trial in a federal court resulted in a general verdict for the plaintiff

over the defendant's request that a verdict for it be directed. Judgment was entered on the verdict for the plaintiff, and the defendant obtained a review in the Court of Appeals. That court examined the evidence, concluded that it was insufficient to support the verdict, and on that basis reversed the judgment given to the plaintiff on the verdict, and directed that judgment be entered for the defendant. A writ of certiorari then brought the case here. The question presented to us was whether, in the situation disclosed, the direction for a judgment for the defendant was an infraction of the Seventh Amendment. We held it was, and that the direction should be for a new trial.

It therefore is important to have in mind the situation to which our ruling applied. In that case the defendant's request for a directed verdict was denied without any reservation of the question of the sufficiency of the evidence or of any other matter; and the verdict for the plaintiff was taken unconditionally, and not subject to the court's opinion on the sufficiency of the evidence. A statute of the state wherein the case was tried (Act April 22, 1905, p. 286, § 1, see 12 P.S.Pa. § 681), made provision for reserving questions of law arising on a request for a directed verdict, but no reservation was made. The same statute also provided that, where a request for a directed verdict was denied, the party making the request could have the evidence made part of the record, and that, where this was done, the trial court, as also the appellate court, should be under a duty "to \* \* \* enter such judgment as shall be warranted by the evidence." It was in conformity with this part of the statute that the Court of Appeals directed a judgment for the defendant.

We recognized that the state statute was applicable to trials in the federal courts in so far as its application would not effect an infraction of the Seventh Amendment, but held that there had been an infraction in that case, in that under the pertinent rules of the common law the Court of Appeals could set aside the verdict for error of law, such as the trial court's ruling respecting the sufficiency of the evidence, and direct a new trial, but could not itself determine the issues of fact and direct a judgment for the defendant, for this would cut off the plaintiff's unwaived right to have the issues of fact determined by a jury.

A very different situation is disclosed in the present case. The trial court expressly reserved its ruling on the defendant's motions to dismiss and for a directed verdict, both of which were based on the asserted insufficiency of the evidence to support a verdict for the plaintiff. Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court. The verdict for the plaintiff was taken pending the court's rulings on the motions and subject to those rulings. No objection was made

to the reservation or this mode of proceeding, and they must be regarded as having the tacit consent of the parties. After the verdict was given, the court considered the motions pursuant to the reservation, held the evidence sufficient, and denied the motions.

The Court of Appeals held that the evidence was insufficient to support the verdict for the plaintiff, that the defendant's motion for a directed verdict was accordingly well taken, and therefore that the judgment for the plaintiff should be reversed. Thus far we think its decision was right. The remaining question relates to the direction which properly should be included in the judgment of reversal.

At common law there was a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as nonsuiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments.

Fragmentary references to the origin and basis of the practice indicate that it came to be supported on the theory that it gave better opportunity for considered rulings, made new trials less frequent, and commanded such general approval that parties litigant assented to its application as a matter of course. But, whatever may have been its origin or theoretical basis, it undoubtedly was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that amendment.

This Court has distinctly recognized that a federal court may take a verdict subject to the opinion of the court on a question of law, and in one case where a verdict for the plaintiff was thus taken has reversed the judgment given on the verdict and directed a judgment for the defendant.

Some of the states have statutes embodying the chief features of the common-law practice which we have described. The state of New York, in which the trial was had, has such a statute; and the trial court, in reserving its decision on the motions which presented the question of the sufficiency of the evidence, and in taking the verdict of the jury subject to its opinion on that question, conformed to that statute and the practice under it as approved by the Court of Appeals of the state.

In view of the common-law practice and the related state statute, we reach the conclusion that the judgment of reversal for the error in denying the motions should embody a direction for a judgment of dismissal on the merits, and not for a new trial. Such a judgment of dismissal will be the equivalent of a judgment for the defendant on a verdict directed in its favor.

The Court of Appeals regarded the decision in *Slocum v. New York Life Insurance Company* as requiring that the direction be for a new trial. We already have pointed out the differences between that case and this. But it is true that some parts of the opinion in that case give color to the interpretation put on it by the Court of Appeals. In this they go beyond the case then under consideration and are not controlling. Not only so, but they must be regarded as qualified by what is said in this opinion.

It results that the judgment of the Court of Appeals should be modified by substituting a direction for a judgment of dismissal on the merits in place of the direction for a new trial, and, as so modified, should be affirmed.

Judgment modified, and affirmed as modified.

#### NOTE

1. See also *Galloway v. U. S.*, 319 U.S. 372, 63 S.Ct. 1077, 87 L. Ed. 1458 (1943); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879 (1913); *Baylis v. Traveller's Ins. Co.*, 113 U.S. 316, 5 S.Ct. 494, 28 L.Ed. 989 (1885).

2. As to the character of actions to which the constitutional right to jury trial extends, see *Parsons v. Bedford*, 3 Pet. 433, 7 L.Ed. 732 (1830); *In re Wood*, 210 U.S. 246, 28 S.Ct. 621, 52 L.Ed. 1046 (1908); *McElrath v. U. S.*, 102 U.S. 426, 26 L.Ed. 189 (1880); *Luria v. U. S.*, 231 U.S. 9, 34 S.Ct. 10, 58 L.Ed. 101 (1913); *Capital Traction Co. v. Hof*, 174 U.S. 1, 19 S.Ct. 580, 43 L.Ed. 873 (1899).

3. As to the composition of a constitutional jury, see *Capital Traction Co. v. Hof*, 174 U.S. 1, 19 S.Ct. 580, 43 L.Ed. 873 (1899). See also *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181 (1946), which, however, did not involve a constitutional issue.

4. As to power of a court, consistently with the Seventh Amendment, to reduce an excessive verdict, see *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 9 S.Ct. 458, 32 L.Ed. 854 (1889); *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 643 (1935).

5. No provision of the federal Constitution requires a state to provide a jury trial in civil cases; *Walker v. Sauvinet*, 92 S.Ct. 90, 23 L.Ed. 678 (1876); *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916).

6. See H. Schofield, *New Trials and the Seventh Amendment*, 8 Ill.L.Rev. 287, 380, 465 (1914).



# APPENDIX

## CONSTITUTION

### OF THE UNITED STATES—1787\*

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WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

#### ARTICLE I

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. <sup>1</sup> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Quali-

\*In May, 1785, a committee of Congress made a report recommending an alteration in the Articles of Confederation, but no action was taken on it, and it was left to the State Legislatures to proceed in the matter. In January, 1786, the Legislature of Virginia passed a resolution providing for the appointment of five commissioners, who, or any three of them, should meet such commissioners as might be appointed in the other States of the Union, at a time and place to be agreed upon, to take into consideration the trade of the United States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act, relative to this great object, as, when ratified by them, will enable the United States in Congress effectually to provide for the same. The Virginia commissioners, after some correspondence, fixed the first Monday in September as the time, and the city of Annapolis as the place for the meeting, but only four other States were represented, viz.: Delaware, New York, New Jersey, and Pennsylvania; the commissioners appointed by Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Under the circumstances of so partial a representation, the commissioners present agreed upon a report, (drawn by Mr. Hamilton, of New York,) expressing their unanimous conviction that it might essentially tend to advance the interests of the Union if the States by which they were respectively delegated would concur, and use their endeavors to procure the concurrence of the other States, in the appointment of commissioners to meet at Philadelphia on the second Monday of May following, to take into consideration the situation of the United States; to devise such further provisions as should appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled as, when agreed to by them, and afterwards confirmed by the Legislatures of every State, would effectually provide for the same.

Congress, on the 21st of February, 1787, adopted a resolution in favor of a convention, and the Legislatures of those States which had not already done so (with the exception of Rhode Island) promptly appointed delegates. On the 25th.

fications requisite for Electors of the most numerous Branch of the State Legislature.

<sup>2</sup> No Person shall be a representative who shall not have attained to the Age of twenty-five Years and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

<sup>3</sup> [Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

The clause of this paragraph inclosed in brackets was amended, as to the mode of apportionment of representatives among the several states, by the fourteenth amendment, § 2, post, and as to taxes on incomes without apportionment, by the sixteenth amendment, post.

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of May, seven States having convened, George Washington, of Virginia, was unanimously elected President, and the consideration of the proposed constitution was commenced. On the 17th of September, 1787, the Constitution as engrossed and agreed upon was signed by all the members present, except Mr. Gerry, of Massachusetts, and Messrs. Mason and Randolph, of Virginia. The president of the convention transmitted it to Congress, with a resolution stating how the proposed Federal Government should be put in operation, and an explanatory letter. Congress, on the 28th of September, 1787, directed the Constitution so framed, with the resolutions and letter concerning the same, to "be transmitted to the several Legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the convention."

On the 4th of March, 1789, the day which had been fixed for commencing the operations of Government under the new Constitution, it had been ratified by the conventions chosen in each State to consider it, as follows: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; and New York, July 26, 1788.

The President informed Congress, on the 28th of January, 1790, that North Carolina had ratified the Constitution November 21, 1789; and he informed Congress on the 1st of June, 1790, that Rhode Island had ratified the Constitution May 29, 1789. Vermont, in convention, ratified the Constitution January 10, 1789, and was, by an act of Congress approved February 19, 1791, "received and admitted into this Union as a new and entire member of the United States."

<sup>4</sup> When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

<sup>5</sup> The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. <sup>1</sup> [The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.]

This paragraph and the clause of paragraph 2 of this section next following, inclosed in brackets, were superseded by the seventeenth amendment, post.

<sup>2</sup> Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.]

See note to preceding paragraph of this section.

<sup>3</sup> No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

<sup>4</sup> The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

<sup>5</sup> The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

<sup>6</sup> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

<sup>7</sup> Judgment in Cases of Impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject

to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. <sup>1</sup> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

<sup>2</sup> The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. <sup>1</sup> Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

<sup>2</sup> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

<sup>3</sup> Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal.

<sup>4</sup> Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. <sup>1</sup> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

<sup>2</sup> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United

States, shall be a Member of either House during his Continuance in Office.

Section. 7. <sup>1</sup> All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

<sup>2</sup> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

<sup>3</sup> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. <sup>1</sup> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

<sup>2</sup> To borrow Money on the credit of the United States;

<sup>3</sup> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

<sup>4</sup> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

<sup>5</sup> To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

<sup>6</sup> To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

<sup>7</sup> To establish Post Offices and post Roads;

<sup>8</sup> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

<sup>9</sup> To constitute Tribunals inferior to the supreme Court;

<sup>10</sup> To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

<sup>11</sup> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

<sup>12</sup> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

<sup>13</sup> To provide and maintain a Navy;

<sup>14</sup> To make Rules for the Government and Regulation of the land and naval Forces;

<sup>15</sup> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

<sup>16</sup> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

<sup>17</sup> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

<sup>18</sup> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. <sup>1</sup> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit,

shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

<sup>2</sup> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

<sup>3</sup> No Bill of Attainder or ex post facto Law shall be passed.

<sup>4</sup> No Capitation, or other direct, tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

<sup>5</sup> No Tax or Duty shall be laid on Articles exported from any State.

<sup>6</sup> No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

<sup>7</sup> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

<sup>8</sup> No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. <sup>1</sup> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

<sup>2</sup> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

<sup>3</sup> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace,

enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## ARTICLE II

Section. 1. <sup>1</sup> The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

<sup>2</sup> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.]

This paragraph, inclosed in brackets, was superseded by the twelfth amendment, post.

<sup>3</sup> The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

<sup>4</sup> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

<sup>5</sup> In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

<sup>6</sup> The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

<sup>7</sup> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. <sup>1</sup> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

<sup>2</sup> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be

established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

\* The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

### ARTICLE III

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. <sup>1</sup> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

<sup>2</sup> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

<sup>3</sup> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. <sup>1</sup> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

<sup>2</sup> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

#### ARTICLE IV

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. <sup>1</sup> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

<sup>2</sup> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.

<sup>3</sup> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. <sup>1</sup> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be

formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

<sup>2</sup> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

## ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

## ARTICLE VI

<sup>1</sup> All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

<sup>2</sup> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

<sup>3</sup> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and

judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of Our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. IN WITNESS whereof We have hereunto subscribed our Names,

Go. WASHINGTON—*Presidt.*  
*and deputy from Virginia*

*New Hampshire*

JOHN LANGDON

NICHOLAS GILMAN

*Massachusetts*

NATHANIEL GORHAM

RUFUS KING

*Connecticut*

WM. SAML. JOHNSON

ROGER SHERMAN

*New York*

ALEXANDER HAMILTON

*New Jersey*

WIL: LIVINGSTON

WM. PATERSON.

DAVID BREARLEY.

JONA: DAYTON

*Pennsylvania*

B. FRANKLIN

THOS. FITZSIMONS

THOMAS MIFFLIN

JARED INGERSOLL

ROBT. MORRIS

JAMES WILSON.

GEO. CLYMER

GOUV MORRIS

*Delaware*

GEO: READ

RICHARD BASSETT

GUNNING BEDFORD jun

JACO: BROOM

JOHN DICKINSON

*Maryland*

JAMES MCHENRY

DANL. CARROLL.

DAN OF ST THOS JENIFER

*Virginia*

JOHN BLAIR—

JAMES MADISON Jr.

*North Carolina*

WM. BLOUNT

HU WILLIAMSON

RICHD. DOBBS SPAIGHT.

*South Carolina*

J. RUTLEDGE

CHARLES PINCKNEY

CHARLES COTESWORTH PINCKNEY PIERCE BUTLER.

*Georgia*

WILLIAM FEW

ABR BALDWIN

Attest

WILLIAM JACKSON *Secretary*

**Articles in Addition to, and Amendment of, the Constitution of  
the United States of America, Proposed by Congress, and  
Ratified by the Legislatures of the Several States Pursuant  
to the Fifth Article of the Original Constitution**

## [ARTICLE I]\*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## [ARTICLE II]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

\*The first ten amendments to the Constitution of the United States were proposed to the legislatures of the several States by the First Congress, on the 25th of September 1789. They were ratified by the following States, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; Pennsylvania, March 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, November 3, 1791, and Virginia, December 15, 1791. There is no evidence on the journals of Congress that the legislatures of Connecticut, Georgia, and Massachusetts ratified them.

## [ARTICLE III]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

## [ARTICLE IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## [ARTICLE V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## [ARTICLE VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

## [ARTICLE VII]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

## [ARTICLE VIII]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## [ARTICLE IX]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## [ARTICLE X]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

## [ARTICLE XI]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

The eleventh amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Third Congress, on the 5th September, 1794, and was declared in a message from the President to Congress, dated the 8th of January, 1798, to have been ratified by the legislatures of three-fourths of the States.

## [ARTICLE XII]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a ma-

jority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The twelfth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Eighth Congress, on the 12th of December, 1803, in lieu of the original third paragraph of the first section of the second article, and was declared in a proclamation of the Secretary of State, dated the 25th of September, 1804, to have been ratified by the legislatures of three-fourths of the States.

#### [ARTICLE XIII]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

The thirteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-eighth Congress, on the 1st of February, 1865, and was declared, in a proclamation of the Secretary of State, dated the 18th of December, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six States, viz: Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia.

#### [ARTICLE XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The fourteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-ninth Congress, on the 16th of June, 1866. On the 21st of July, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress: Therefore, Resolved, That

said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated the 28th of July, 1868, declaring that the proposed fourteenth amendment had been ratified, in the manner hereafter mentioned, by the legislatures of thirty of the thirty-six States, viz: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866, (and the legislature of the same State passed a resolution in April, 1868, to withdraw its consent to it;) Oregon, September 19, 1866; Vermont, November 9, 1866; Georgia rejected it November 13, 1866, and ratified it July 21, 1868; North Carolina rejected it December 4, 1866, and ratified it July 4, 1868; South Carolina rejected it December 20, 1866, and ratified it July 9, 1868; New York ratified it January 10, 1867; Ohio ratified it January 11, 1867, (and the legislature of the same State passed a resolution in January, 1868, to withdraw its consent to it;) Illinois ratified it January 15, 1867; West Virginia, January 16, 1867; Kansas, January 18, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Missouri, January 26, 1867; Indiana, January 29, 1867; Minnesota, February 1, 1867; Rhode Island, February 7, 1867; Wisconsin, February 13, 1867; Pennsylvania, February 13, 1867; Michigan, February 15, 1867; Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, April 3, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; Louisiana, July 9, 1868; and Alabama, July 13, 1868. Georgia again ratified the amendment February 2, 1870. Texas rejected it November 1, 1866, and ratified it February 18, 1870. Virginia rejected it January 19, 1867, and ratified October 8, 1869. The amendment was rejected by Kentucky January 10, 1867; by Delaware February 8, 1867; by Maryland March 23, 1867, and was not afterward ratified by either State.

#### [ARTICLE XV]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

The fifteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Fortieth Congress, on the 27th of February, 1869, and was declared, in a proclamation of the Secretary of State, dated March 30, 1870, to have been ratified by the legislatures of twenty-nine of the thirty-seven States. The dates of these ratifications (arranged in the order of their reception at the Department of State) were: from North Carolina, March 5, 1869; West Virginia, March 3, 1869; Massachusetts, March 9-12, 1869; Wisconsin, March 9, 1869; Maine, March 12, 1869; Louisiana, March 5, 1869; Michigan, March 8, 1869; South Carolina, March 16, 1869; Pennsylvania, March 26, 1869; Arkansas, March 30, 1869; Connecticut, May 19, 1869; Florida, June 15, 1869; Illinois, March 5, 1869; Indiana, May 13-14, 1869; New York, March 17-April 14, 1869, (and the legislature of the same State passed a resolution January 5, 1870, to withdraw its consent to it;) New Hampshire, July 7, 1869; Nevada, March 1, 1869; Vermont, October 21, 1869; Virginia, October 8, 1869; Missouri, January 10, 1870; Mississippi, January 15-17, 1870; Ohio, January 27, 1870; Iowa, February 3, 1870; Kansas, January 18-19, 1870; Minnesota, February 19, 1870; Rhode Island, January 18, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870. The State of Georgia also ratified the amendment February 2, 1870.

#### [ARTICLE XVI]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment

among the several states, and without regard to any census or enumeration.

The sixteenth amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Sixty-First Congress, on the 31st of July, 1909, and was declared, in a proclamation by the Secretary of State, dated the 25th of February, 1913, to have been ratified by the legislatures of the states of Alabama, Kentucky, South Carolina, Illinois, Mississippi, Oklahoma, Maryland, Georgia, Texas, Ohio, Idaho, Oregon, Washington, California, Montana, Indiana, Nevada, North Carolina, Nebraska, Kansas, Colorado, North Dakota, Michigan, Iowa, Missouri, Maine, Tennessee, Arkansas, Wisconsin, New York, South Dakota, Arizona, Minnesota, Louisiana, Delaware, and Wyoming, in all thirty-six, said states constituting three-fourths of the whole number of states. The legislatures of New Jersey and New Mexico also passed resolutions ratifying the said proposed amendment.

### [ARTICLE XVII]

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

The seventeenth amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Sixty-Second Congress, on the 15th of May, 1912, in lieu of the original first paragraph of section 3 of article I, and in lieu of so much of paragraph 2 of the same section as related to the filling of vacancies, and was declared, in a proclamation by the Secretary of State, dated the 31st of May, 1913, to have been ratified by the legislatures of the states of Massachusetts, Arizona, Minnesota, New York, Kansas, Oregon, North Carolina, California, Michigan, Idaho, West Virginia, Nebraska, Iowa, Montana, Texas, Washington, Wyoming, Colorado, Illinois, North Dakota, Nevada, Vermont, Maine, New Hampshire, Oklahoma, Ohio, South Dakota, Indiana, Missouri, New Mexico, New Jersey, Tennessee, Arkansas, Connecticut, Pennsylvania, and Wisconsin, said states constituting three-fourths of the whole number of states.

### [ARTICLE XVIII]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

This amendment was proposed to the legislatures of the several states by the Sixty-Fifth Congress, on the 19th day of December, 1917, and was declared, in a proclamation by the Acting Secretary of State, dated on the 29th day of January, 1919, to have been ratified by the legislatures of the states of Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming; said states constituting three-fourths of the whole number of states in the United States, and certified as valid to all intents and purposes as a part of the Constitution of the United States.

This amendment was repealed by Amendment XXI, p. xxxiv.

#### [ARTICLE XIX]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

This amendment was proposed to the legislatures of the several states by the Sixty-Sixth Congress, on the 5th day of June, 1919, and was declared, in a proclamation by the Secretary of State, dated on the 26th day of August, 1920, to have been ratified by the legislatures of the states of Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin and Wyoming—said states constituting three-fourths of the whole number of states in the United States, and certified as valid to all intents and purposes as a part of the Constitution of the United States.

#### [AMENDMENT XX]

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Sec. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Sec. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Sec. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Sec. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Sec. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

This amendment was proposed to the legislatures of the several states by the Seventy-Second Congress, on the 3d day of March, 1932, and was declared, in a proclamation by the Secretary of State, dated on the 6th day of February, 1933, to have been ratified by the legislatures of the states of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming—said states constituting three-fourths of the whole number of states in the United States, and certified as valid to all intents and purposes as a part of the Constitution of the United States.

### [AMENDMENT XXI]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions

in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

This amendment to the Constitution was proposed to the several states by the Seventy-Second Congress, on the 20th day of February, 1933, and was declared, in a proclamation by the Secretary of State, dated on the 5th day of December, 1933, to have been ratified by conventions in the States of Arizona, Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming—said states constituting three-fourths of the whole number of states in the United States, and certified as valid to all intents and purposes as a part of the Constitution of the United States.

ROTTSCHAEFER MCB CONST.LAW—61

## PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

### [AMENDMENT —]

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

Sec. 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

Proposed by the Sixty-Eighth Congress on June 2, 1924.

### [AMENDMENT —]

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Sec. 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

#### RATIFICATION BY THE STATES

California .....	April 15, 1947	Nebraska .....	May 23, 1947
Colorado .....	April 12, 1947	New Hampshire .....	April 1, 1947
Connecticut .....	May 21, 1947	New Jersey .....	April 15, 1947
Delaware .....	April 2, 1947	New York .....	March 9, 1948
Illinois .....	April 3, 1947	Ohio .....	April 16, 1947
Iowa .....	April 1, 1947	Oregon .....	April 3, 1947
Kansas .....	April 1, 1947	Pennsylvania .....	April 29, 1947
Maine .....	March 31, 1947	Vermont .....	April 15, 1947
Michigan .....	March 31, 1947	Wisconsin .....	April 16, 1947
Missouri .....	May 22, 1947		

ROTTSCHAEFER MCB CONST. LAW

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